The Central Law Journal.

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THE appointment of United States District Judge Henry B. Brown, of Michigan, to the vacancy in the United States Supreme Court, is not the best that could have been made, but it is in every respect more satisfactory than would have been the nomination of some whose names were mentioned prominently for the position. It can be said, at least, that the new supreme judge is a man of more than ordinary attainments, has made a creditable record as judge of the district court, and will compare favorably with some of the more recent appointments to the highest court. Besides, the appointment is in line with the civil service policy of the government, and for that reason should be warmly commended. As a matter of fact, the president, in his appointment to judicial positions, has so far, in every instance we believe, carried out the civil service theory. Judge Brown is a native of Massachusetts, is 54 years of age, and has been fourteen years judge of the United States District Court for the Eastern District of Michigan.

THE recent decision of Judge Gresham, in *Re* Counselman and *Re* Peasley, involving the refusal of certain witnesses in a prosecution, under the interstate commerce law, to answer certain questions propounded to them, upon the ground that they could not do so without criminating themselves, is an interesting and important one. The witnesses declined to give figures and produce papers before the federal grand jury, relating to the manipulation of freight rates, thus practically making it impossible to investigate their proceedings as agents of the railroad companies by which they were employed. Judge Gresham says they must answer the questions asked them, no matter what admissions of personal wrongdoing they may have to make, because section 860 of the Revised Statutes of the United States provides that such admissions shall not be used in any proceedings against them. He holds that the constitutional provision does not, as is generally supposed, give a witness the right to close his mouth whenever a point is touched that may involve a confession of guilt on his part. The witness cannot be compelled to disclose facts to a court or grand jury which might subject him to a criminal prosecution or his property to forfeiture. But where there is a statute declaring that such testimony shall never be repeated against him in any other case, he is estopped from entering the plea of constitutional exemption. There is a difference of opinion among lawyers as to the authority of congress to pass a law which thus sets aside the operation of the constitutional provision. The view of Judge Gresham, however, seems to be conclusive. The intention of this article of the constitution, he argues, was not to shield men from the necessity of furnishing evidence against themselves. And when the disclosures of a witness, however guilty they may show him to be, can never be repeated in any subsequent proceeding against him or his property, he is as fully protected as the constitution intended he should be. The consequences of this decision, so far as railroad companies are concerned, will be far-reaching, as it places them in a position where they must require their agents to obey the law, since those agents may at any moment be forced to divulge the secrets of their service. The cases have gone to the United States Supreme Court, where their fate will be awaited with great interest, though it is generally believed that the view of Judge Gresham is eminently sound, and will be upheld.

AN English law journal tells of an exceedingly embarrassing question which is occupying the earnest attention of the coroners of two adjacent counties, and as the question is one that might arise in this country, we call attention to it. It seems that a man was killed by a train on one of the English railways. The body of the man was found near the scene of the accident, but his head was carried by the engine into another county. The question is, in what county is the inquest to be held? Under the act as to coroners, it appears that the coroner only has jurisdiction in whose county the body of the

person is lying, and as no definition of "body" is provided, the coroner for the county in which the head was found has some ground for contending that the corpse without a head lying in his brother coroner's jurisdiction is not the body of the person. It certainly is not the whole body. On the other hand, the coroner for the county in which the headless corpse was found has stronger ground for saying that the head of a person is not the body. We agree with the law journal which notes this embarrassing question, and which hazards the opinion that inasmuch as both the body and the head were at one time—namely, after the accident and while the train was passing on its way to the adjoining county—lying in the same county, the fact that the engine, after the death of the deceased, carried off his head into another county, does not deprive the coroner, who has got the body, of jurisdiction. It seems to us, on the whole, that the head must come back.

NOTES OF RECENT DECISIONS.

CONSTITUTIONAL LAW — MUNICIPAL CORPORATION — ORDINANCE — SIDEWALKS. — A question of constitutional law of more than ordinary interest, and involving the validity of municipal ordinances, came before the Court of Appeals of New York, in Village of Carthage v. Frederick, 25 N. E. Rep. 480. There it was held that a village ordinance, passed pursuant to legislative authority, prohibiting the accumulation of ice, snow or other obstruction on sidewalks, and requiring the removal thereof by the lot owner or tenant by 10 o'clock of the forenoon of the day the same shall have fallen or collected thereon, under penalty of a fine, is a legitimate exercise of the police power, and is not a taking of private property for public use, within Const. N. Y. art. 1, § 6. Vann, J., says:

Mr. Sedgwick, in his work on Constitutional Law, says that "the clause prohibiting the taking of private property without compensation is not intended as a limitation of the exercise of those police powers which are necessary to the tranquility of every well-ordered community, nor of that general power over private property which is necessary for the orderly existence of all governments. It has always been held that the legislature may make police regulations, although they may interfere with the full enjoyment of private property, and though no compensation is given." Sedg. St. & Const. Law, 434-437.

A recent writer upon the Limitations of Police Power says that "where the letter of the constitution would prohibit police regulations, which, by all the principles of constitutional government, have been recognized as beneficient and permissible restrictions upon the individual liberty of action, such regulations will be upheld by the courts, on the ground that the framers of the constitution could not possibly have intended to deprive the government of so salutary a power; and hence the spirit of the constitution permits such legislation, although a strict construction of the letter may prohibit." Tied. Lim. 12. "A large part of the police power of the State is exercised by the local governments of municipal corporations, and the extent of their police powers depends upon the limitations of their charters." *Id.* 638. "The limit to the exercise of the police power can only be this: The legislation must have reference to the comfort, the safety, or the welfare of society, and it must not be in conflict with the provisions of the constitution." Potter's Dwar. St. 458.

Judge Dillon, in his work on Municipal Corporations (volume 1, p. 212), says that "every citizen holds his property subject to the proper exercise of this [police] power, either by the State legislature directly, or by public or municipal corporations to which the legislature may delegate it. * * * It is well settled that laws and regulations of this character, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances. * * * If one suffers injury, it is either *damnum absque injuria*, or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure." The courts have been equally emphatic in their declarations upon the subject. In Thorpe v. Railroad Co., 27 Vt. 140, the court said: "There is also the general police power of the State by which persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity, of the perfect right in the legislature to do which no question ever was, or, upon acknowledged general principles ever can be, made."

Chief Justice Shaw, in deciding a case involving the collection of penalty imposed for the violation of a municipal ordinance requiring the owners or occupants of houses bordering on streets to remove the snow from their respective sidewalks within a specified time, used this significant language: "It is not speaking strictly to characterize this city ordinance as a law levying a tax, the direct or principal object of which is the raising of revenue. It imposes a duty upon a large class of persons, the performance of which requires some labor and expense, and therefore indirectly operates as a law creating a burden. But we think it is rather to be regarded as a police regulation, requiring a duty to be performed highly salutary and advantageous to the citizens of a populous and closely-built city, and which is imposed upon them because they are so situated that they can most promptly and conveniently perform it; and it is laid, not upon a few, but upon a numerous class—all those who are so situated, and equally upon all who are within the description composing the class. * * * Although the sidewalk is part of the public street and the public have an easement in it, yet the adjacent occupant often is the owner of the fee, and generally has some

peculiar interest in it, and benefit from it, distinct from that which he enjoys in common with the rest of the community. He has this interest and benefit often in accommodating his cellar door and steps, a passage for fuel, and the passage to and from his own house to the street. * * * For his own accommodation, he would have an interest in cleaning the snow from his own door. The owners and occupiers of house lots and other real estate, therefore, have an interest in the performance of this duty, peculiar and somewhat distinct from that of the rest of the community. Besides, from their situation, they have the power and ability to perform this duty with the promptness which the benefit of the community requires; and the duty is divided, distributed, and apportioned upon so large a number that it can be done promptly and effectually, and without imposing a very severe burden upon any one." *In re* Goddard, 16 Pick. 504, 509, 510.

In a recent case, this court, referring to the police power, said: "That power is very broad and comprehensive, and is exercised to promote the health, comfort, safety, and welfare of society. * * * Under it the conduct of an individual, and the use of property may be regulated so as to interfere to some extent with the freedom of the one, and the enjoyment of the other." *In re* Jacobs, 98 N. Y. 98-108. And in another late case the court declared that "all property is held subject to the general police power of the State to so regulate and control its use in a proper case as to secure the general safety, and the public welfare." People v. Gillson, 109 N. Y. 389, 398, 17 N. E. Rep. 343. In both of the cases last referred to, the police power was distinctly recognized, but it was held that a statute, to be sustained as an exercise of that power, must have some relation to the public health, comfort, or safety, and that the rights of property could not be invaded under the guise of a police regulation for the protection of health, when it was manifest that such was not the object of the regulation.

The following authorities, some expressly and others in principle, justify the passage of the ordinance in question as a proper exercise of police power lawfully delegated to a municipal corporation by the legislature: People v. Mattimore, 45 Hun, 448; Mayor, etc., v. Williams, 15 N. Y. 502, 505; Phelps v. Racey, 60 N. Y. 10: Cronin v. People, 82 N. Y. 318: Moore v. Gadsden, 93 N. Y. 12, 17; Dixon v. Railroad Co., 100 N. Y. 170, 176, 3 N. E. Rep. 65; People v. Arensberg, 105 N. Y. 123, 11 N. E. Rep. 277; Vanderbilt v. Adams, 7 Cow. 349; Coates v. Mayor, etc., *Id.* 585, 606; Stokes v. City of New York, 14 Wend. 88; Sharpless v. Mayor, etc., 21 Pa. St. 147; Beer Co' v. Massachusetts, 97 U. S. 25, 33.

If this power of local legislation can be conferred upon the largest city in the State, it can also be conferred upon the smallest village that the legislature sees fit to incorporate. In this latitude the accumulation of snow upon sidewalks in large quantities is a matter of course. Its presence retards travel, interrupts business, and interferes with the safety and convenience of all classes. It is a frequent cause of accidents, and thus affects the property of every person who is liable to assessment to pay the damages caused by a failure to remove it. But how is it possible for the authorities of a large city, with many hundred miles of streets, to remove the snow in time to prevent injury to those who have the right to travel upon the sidewalks, unless they can require the owners and occupants of adjacent property to remove it? Every man can conveniently and promptly attend to that which is in front of his own door, and it is both reasonable and necessary that he should be compelled to do so. We think that the ordinance under consideration is valid; that it conflicts with no provision of the constitution; and that it is the duty of the courts to enforce it. In reaching this conclusion we have not overlooked the case of Gridley v. City of Bloomington, 88 Ill. 554, but have given it the attention to which it is entitled by the high standing of the court that decided it. The argument upon which the opinion in that case rests is that, as the fee of the street was in the corporation, and the sidewalk was a part of the street, the lot-owner had no more interest in the sidewalk in front of his premises than any other citizen of the municipality, because it was set apart for the exclusive use of persons traveling on foot, and was as much under the control of the municipal government as the street itself. We are unable to yield to this reasoning, because it overlooks not only the public safety and general convenience, but also the peculiar interest that every owner or occupant of real property has in a clean sidewalk in front of his own premises.

CARRIERS OF GOODS — REBATE — DISCRIMINATION.—The Supreme Court of Iowa, in Cook v. Chicago, R. I. & P. Ry. Co., 46 N. W. Rep. 1080, decide that a rebate secretly paid by a common carrier to certain shippers being an unjust discrimination against others shipping the same class of goods under the same conditions at the regular rate without rebate, is illegal at common law. Rothrock, C. J., says:

It is well to keep it mind the fact that the defendant is a public common carrier. At common law a public or common carrier is bound to accept and carry for all upon being paid a reasonable compensation. The fact that the charge is less for one than another is only evidence to show that a particular charge is unreasonable. In Story on Bailments, § 508, note 3, it is said: "There is nothing in the common law to hinder a carrier from carrying for favored individuals at an unreasonably low rate, or even *gratis*." And in 1 Wood, Ry. Law, 566, it is said: "A mere discrimination in favor of a customer is not unlawful unless it is an unjust discrimination." In volume 2, p. 95, Redf. R. R., the following language is used: "It has been held in this country, where there is no statutory regulation affecting the question, that common carriers are not absolutely bound to charge all customers the same price for the same service. But as the rule is clearly established at common law that a carrier is bound by law to carry everything which is brought to him, for a reasonable sum to be paid to him for the same carriage, and not to extort what he will, it would seem to follow that he is bound to carry for all at the same price, unless there is some special reason for the distinction. For, unless this were so, the duty to carry for all would not be of much value to the public, since it would be easy for the carrier to select his own customers at will by the arbitrary discrimination in his favor. Hence, it was held at an early day that all that could be required on the part of the owner of the goods, by way of compensation, was that he should be ready and willing to pay a reasonable compensation, and to deposit the money in advance, if required. Carrying for

reasonable compensation must imply that the same compensation is accepted always for the same service, else it could not be reasonable, either absolutely or relatively." In Hutchinson on Carriers, 243, after a review of the cases, it is said; "Hence, we may conclude that in this country, independently of statutory provisions, all common carriers will be held to the strictest impartiality in the conduct of their business, and that all privileges or preferences given to one customer, which are not extended to all, are in violation of public duty." An examination of the authorities cited by these learned authors leaves no doubt that a common carrier has no right to make unreasonable charges for his services, and that he cannot lawfully make unjust discrimination between his customers. It is strenuously contended by counsel for appellant that it is not charged in the petition as a substantial fact that the rate charged the plaintiffs was unreasonable. It is distinctly averred that the rate charged the plaintiffs "was unreasonable, and is and was an unjust discrimination." This appears to us to be a sufficient answer to the argument of counsel to the effect that the action is founded solely upon the fact of mere difference in rates. It appears to be conceded that the defendant had no right to exact unreasonable rates or to make unjust discriminations between shippers which in effect compels one shipper to pay an unreasonable rate. The above principles of law may be said to be fundamental, and it is only necessary to apply the facts to reach the conclusion that the rates paid by the plaintiffs were unreasonable and unjust discrimination. It is not claimed that the favored shippers were objects of the charity of the defendant. The payment of the rebates cannot be designated as "alms giving." It does not appear that the concessions were made because the favored shippers furnished more shipments than the plaintiffs. The fact is that some of the others shipped less than the plaintiffs. In short there is no reason for the discrimination. It is true that it is claimed that the rebate shippers bought cattle and hogs from territory in which shipments would ordinarily be made upon other railroads, but the evidence shows that the plaintiffs' field of operation was about the same as the other shippers. It does not appear that the rebates were allowed merely at times when there were cut rates or a war of rates between the defendant and rival railroad lines. The rebates were paid regularly for years, with but short intervals. It is to be supposed that any court or jury under this state of facts would solemnly find, declare, and adjudge that, after paying the rebate, the defendant did not have a reasonable compensation for the service? The only finding that can in any fairness be made is that, after deducting the rebate, the rate was reasonable; and that the exaction from the plaintiffs was unreasonable, and the discrimination against them unjust. And the fact that it was secretly done, and that it appeared to be necessary to carry it on by lying and deceit, surely does not tend to commend such a course of dealing to fair-minded men. We have been cited to a number of adjudged cases, by counsel for the respective parties, and we think we may safely say that not one of them is in conflict with the views we have herein expressed upon this question. On the contrary, and in support of our conclusion, see Sharpless v. Mayor, 21 Pa. St. 147; New England Exp. Co. v. Maine Cent. R. Co., 57 Me. 188; McDuffee v. Railway Co., 52 N. H. 430; Messenger v. Ry. Co. 36 N. J. Law 407.

TELEGRAPH COMPANIES—LIMITING LIABILITY—NEGLIGENCE—DAMAGES.—The power of a telegraph company to limit its liability was well considered by the Supreme Court of Arkansas, in Western Union Telegraph Co. v. Short., 14 S. W. Rep. 649. There it was held that an agreement between the sender of a telegram and the company, that the company shall not be liable for mistake or delays in the transmission or delivery unless it is repeated, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same, is void as against public policy. Battle, J., says:

Common carriers of goods and telegraph companies are not subject to the same rule of responsibility. The common carrier is held to the strictest accountability for the safe transportation and delivery of property intrusted to him for safe carriage. In the absence of a contract or regulation limiting his liability, he is treated as an insurer against all losses not caused by the act of God or the public enemy. On the other hand, in the absence of a contract or regulation fixing the liability of telegraph companies, they are not held responsible as insurers of absolute safety and accuracy in the transmission of messages as against all contingencies, but, holding themselves out to the public ready to transmit all messages delivered to them, they are bound to furnish suitable instruments and competent servants, and to use ordinary care and diligence in transmitting messages; and for any failure to use such care and diligence they are responsible to those sustaining loss or damage thereby. They are, however, not liable for the want of any skill or knowledge not reasonably attainable in the present state of telegraphy, "nor for errors resulting from the peculiar and unknown condition of the atmosphere, or any agency, from whatever source, which the degree of skill and care spoken of is insufficient to guard against or avoid." Telegraph Co. v. Davis, 41 Ark. 79; Fowler v. Telegraph Co., 80 Me. 381, 15 Atl. Rep. 29; 2 Shear. & R. Neg. (4th ed.) §§ 537, 539, and cases cited.

Telegraph companies are public agents, and exercise a public employment. They are chartered for public purposes, and are vested with the power of eminent domain, which they cannot lawfully exercise if they are not public agents. By virtue of their public employment, it is their duty, for a reasonable consideration, to receive and transmit all messages over their wires with that integrity, skill, and diligence which appertain to their business. "They are a commercial necessity. Business cannot be transacted without them only at a great disadvantage. In most places there is no choice as to lines, and, where there is, it is so limited that a virtual monopoly exists. On the other hand, the occasion for sending a message often come suddenly, or with so short a notice," as to compel the sending of the message by telegraph without delay, or the suffrance of pecuniary loss by the failure to do so. Often the customer cannot afford to wait, and must submit to the terms of the telegraph company. They do not stand upon an equality. The public is compelled to accept the services of the telegraph company, and to rely upon it discharging its duty. In this and other respects the employment of the tele-

graph company and the common carrier of goods are strongly analogous. The business in which each are engaged is almost equally important to the public. Vast interests are committed to each, and good faith and diligence in the discharge of the duties of each are essential to the interest of the public. In both cases the demand of a sound public policy alike forbid any stipulations to relieve them of the duty to use the care and diligence resting upon them. To hold otherwise would be to give license and immunity to carelessness and negligence on the part of each, and would be disastrous to the interests of the public. Smith v. Telegraph Co., 8 Amer. & Eng. Corp. Cas. 15; Telegraph Co. v. Blanchard, 68 Ga. 299; Sweatland v. Telegraph Co., 27 Iowa, 433; Harkness v. Telegraph Co., 73 Iowa, 190, 34 N. W. Rep. 811; Bartlett v. Telegraph Co., 62 Me. 209; Express Co. v. Caldwell, 21 Wall. 269; Telegraph Co. v. Meredith, 95 Ind. 93; Telegraph Co. v. Tyler, 74 Ill. 168; Tyler v. Telegraph Co. 60 Ill. 421; Candee v. Telegraph Co., 34 Wis. 471; Thompson v. Telegraph Co., 64 Wis. 531, 25 N. W. Rep. 789; Gray, Tel. §§ 46-52; 2 Redf. R. R. (6th ed.) pp. 342, 345, 346, §§ 12, 16, 17; 2 Shear. & R. Neg. (4th ed.) § 553; 8 Amer. & Eng. Corp. Cas. 44, note and cases cited; 14 Fed. Rep. 720, and cases cited; 2 Thomp. Neg. pp. 841, 843, § 6.

In this case, the agreement between the sender of the message and the company was that the company should not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of the message sent, unless it was repeated, whether happening by negligence of its servants, or otherwise, beyond the amount received for sending the same. By this stipulation the company clearly undertakes to relieve itself of all liability for negligence, the message not having been repeated, and is contrary to public policy, and void. It is true that many authorities have held that such an agreement is "binding upon all who assent to it, so as to exempt the company from liability, beyond the amount stipulated, for any cause except for willful misconduct or gross negligence on the part of the company." One of the reasons assigned by these authorities for so holding is "the risks and uncertainties attendant on the transmission of messages by reason of electricity, and the difficulties in the way of guarding against errors and delays in the performance of such a service, and the very extensive liability to damages which may be incurred by a failure to deliver a message accurately." But it seems to us that this is not a sufficient reason why such stipulation should be sustained. The telegraph company is only bound to use ordinary care and diligence in transmitting messages, and is not responsible for any errors or failures which such care and diligence are insufficient to guard against or avoid.

The same authorities further hold that the regulation or agreement that the message must be repeated in order to hold the company liable for negligence beyond the amount received for sending the message is a reasonable precaution taken by the company, and binding on all who assent to it. They say: "The repetition of a message may be unimportant. A mistake in its transmission might occasion no serious damage or inconvenience to the parties interested. Whether it would do so or not would be within the knowledge of the sender or receiver, rather than within that of the operator who transmitted it. The latter could rarely be expected to know what would be the consequences of an error in its transmission. It is therefore a most reasonable requisition that it should be left to those who know the occasion, and the subject of the message, and who can best judge of the consequences attendant upon any mistake in sending it, to determine whether it is of a nature to render a repetition necessary to ascertain its accuracy instead of throwing this burden on the owner or conductor of the telegraph, who cannot be supposed to know the effect of a mistake, or the consequences in damages of a failure to transmit it correctly." This may be true. But, we think, the failure to repeat should not relieve the company of the duty to use due care and diligence in transmitting the message without repetition, and of liability for losses incurred by reason of the failure to do so. The fact that the company could not, from an inspection of the message, know its importance, and forsee the consequences of a failure to send it correctly, or had no notice of the special circumstances under which it was sent, is a matter that ought to affect only the amount of damages for which the company should be held liable.

THE LAW AS TO MARRIED WOMEN IN MISSOURI AS AFFECTED BY THE REVISED STATUTES OF 1889, SECTION 6864.

The *status* of the *feme covert*, instead of being fixed by the legislation partially enfranchising the wife, becomes a more difficult question, for the new rights and powers must be adjusted, ordinarily, to old and continuing disabilities. Prior to the statute here in question, only the separate estate of married women could be subjected to their debts in Missouri,[1] and then only in equity, for the proceedings were strictly *in rem* and a judgment *in personam* against a married woman was not valid even after the statute of 1875.[2] Now, however, the new section makes a married woman for most purposes a *feme sole* and authorizes a judgment against her without joining her husband, and there would seem to be no reason why any restrictions should remain from the old equity system to prevent the enforcement of common law rules.

A judgment may now be rendered against a married woman on which execution may issue, at least against her separate estate[3] and probably against her legal estate; for the object of the statute is to restore her to the powers which she had in the eyes of the law before she married, and not to enable her to do in equity what she could do before. The

[1] Davis v. Smith, 75 Mo. 219.

[2] Weil v. Simmons, 66 Mo. 618; Kimball v. Silvers, 22 Mo. App. 530.

[3] Jones v. Glass, 48 Iowa, 345.

law, as it stands to-day, enables her to dispense with trustees and to act for herself by the simple and direct means recognized by the law, as if she were unmarried.[4]

The courts of law should have jurisdiction of all questions arising under the new sections, for rights given under statutes, unless specially declared to be equitable, are cognizable by courts of law,[5] and a married woman is as much bound by the decision of a court of competent jurisdiction as an unmarried woman.[6]

Where a married woman is given the power to contract she may bind her separate estate by any contract which a *feme sole* can,[7] and no reason can be advanced why she should not bind property in which she has a dry legal estate. She may, in contradistinction to the liabilities imposed by equity, bind herself personally by a contract of suretyship.[8] She is no longer restricted to contracts relating to her separate estate, but may make any contract she pleases, and if the law allows the contract it can be enforced legally,[9] for if she enjoys the rights of a *feme sole* she must perform the corresponding obligations.[10]

In an action against her, the husband need not be joined, and since the reason has failed he ought not to be joined. It is true the words are permissive, but the purpose is to cut up by the roots the marital rights of the husband in the wife's property and rights of action, and to set her free from the thraldom of the common law in respect thereto, and confer upon her the rights and privileges of an independent legal existence. It would, therefore, be inconsistent with the spirit of the act to construe it as permissive merely and not mandatory,[11] for she has such an independent existence that she may be sued jointly with her husband[12] and her estate is liable to him as to any other person,[13] though probably she cannot yet, in Missouri, make a valid parol gift to him.[14]

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[4] Krounskop v. Shortz, 51 Wis. 216.
[5] Meyers v. Rahter, 46 Wis. 655; Stockton v. Farley, 10 W. Va. 175.
[6] Ratcliffe v. Stretch, 117 Ind. 526.
[7] Good v. Moulton, 67 Cal. 536; Kendall v. Johnson, 119 Mass. 251; Springer v. Berry, 47 Me. 336.
[8] Roberson v. Queen, 3 Pick. (Tenn.) 445; Sypert v. Harrison, 11 S. W. Rep. (Ky.) 435; Mays v. Hutchinson, 57 Me. 546.
[9] Major v. Holmes, 124 Mass. 108; Kenworthy v. Sawyer, 125 Mass. 28; Reed v. Newcomb, 59 Vt. 630; Fairlie v. Bloomingdale, 38 Hun, 220.
[10] Boston v. Cumming, 16 Ga. 102.
[11] Wright v. Burroughs, 61 Vt. 394.
[12] Reed v. Newcomb, 59 Vt. 630.
[13] Constantinides v. Walsh, 146 Mass. 281.
[14] Boughton v. Brand, 94 Mo. 174.

GIFT—DELIVERY.

COCHRANE V. MOORE.

English Court of Appeal, April 28, 1890.

In order to constitute a completed parol gift of personal property capable of being delivered and pass the title to the donee, there must be a delivery of the property.

FRY, L. J.: The judgment I am about to read is that of Bowen, L. J., and myself. The question in this interpleader issue arises in respect of a sum of money representing one-fourth of the proceeds of a horse called Kilworth, sold by Messrs. Tattersall. The plaintiff claims the money under a bill of sale executed by one Benzon, comprising this and other horses. The defendant claims it under an earlier gift of one-fourth of the horse to him by Benzon. The relevant facts, as they appear in the judgment of Lopes, L. J., and in that part of the evidence to which he attached credence, are shortly as follows: The horse was in June 1888, the property of Benzon, and was kept at the stables of a trainer named Yates, in or near Paris, and on the 8th of that month was ridden in a steeplechase by Moore, a gentleman rider. In consequence, as it appears, of some accident, the horse was not declared the winner, and on the same day, according to the view of the evidence taken by the learned judge, Benzon by words of present gift gave to Moore, and Moore accepted from Benzon, one undivided fourth part of this horse. A few days subsequently Benzon wrote to Yates, in whose stables the horse was, and told him of the gift to Moore. But he did not inform Moore, nor did Moore know of any communication to Yates of the fact of the gift. On the 9th of July, 1888, Cochrane advanced £3,000 by way of loan to Benzon, and took from him a promissory note for £3,500, payable on the 9th of August following. On the 16th of July of the same year, Cochrane advanced to Benzon a further sum of £4,000, and took a promissory note for £4,800, payable on the 16th of September. On the 26th of July Cochrane advanced to Benzon two sums of money: One, £1,680, 10s. 11d. (to be paid to one Sherard, a trainer), and £745, making together £2,425 10s. 11d. And on the same day Benzon executed a bill of sale for £10,000, under which Cochrane claims. Kilworth and other horses were included in the schedule to this instrument. It is proved

by the evidence of the witnesses, whom the learned judge believed, that before the execution of the bill of sale, Benzon, with the assistance of a friend, Mr. Powell, was going through the list of horses to be included in the schedule, and that when Kilworth was mentioned Powell spoke of Moore's interest in the horse, and that thereupon a discussion arose as to what was to be done with it, and that Cochrane undertook that it should be "all right." After this the bill of sale was executed by Benzon. On these facts, it was argued that there was no delivery and receipt of the one-fourth of the horse, and consequently, that no property in it passed by the gift. The learned judge has, however, held that delivery is not indispensable to the validity of the gift. The proposition on which the lord justice proceeded may perhaps be stated thus: that where a gift of a chattel capable of delivery is made *per verba de præsenti* by a donor to a donee, and is assented to by the donee, and that assent is communicated to the donor by the donee, there is a perfect gift, which passes the property without delivery of the chattel itself. This proposition is one of much importance, and has recently been the subject of some diversity of opinion. We therefore feel it incumbent upon us to examine it, even though it might be possible in the present case to avoid that examination. The proposition adopted by the lord justice is in direct contradiction to the decision of the Court of King's Bench in the year 1819 in Irons v. Smallpiece, 2 B. & Ald. 551. That case did not proceed upon the character of the words used, or upon the difference between *verba de præsenti* and *verba de futuro*, but upon the necessity of delivery to a gift otherwise sufficient. The case is a very strong one, because a court consisting of Lord Tenterden, C. J., and Best and Holroyd, JJ., refused a rule *nisi*, and all held delivery to be necessary. The chief justice said: "I am of opinion that, by the law, of England, in order to transfer property by gift, there must either be a deed or instrument of gift, or there must be an actual delivery of the thing to the donee," and he went on to refer to the case of Bunn v. Markham, 2 Marsh. 532, as a strong authority. These observations of the chief justice have created some difficulty. What did he mean by an instrument as contrasted with a deed? If he meant that an instrument in writing not under seal was different from parol in respect of a gift *inter vivos*, he was probably in error; but if in speaking of the transfer of property by gift, he included gifts by will as well as gifts *inter vivos*, then by instrument he meant testamentary instrument, and his language was correct. Holroyd, J., was equally clear on the principal point: "In order to charge the property by a gift of this description" (by which we understand him to mean a gift *inter vivos*) "there must be a change of possession." The correctness of the proposition thus laid down has been asserted in many subsequent cases of high authority. Thus in Reeves v. Capper, 5 Bing. N. C. 136, the Court of Common Pleas under Tindal, C. J., referred to Irons v. Smallpiece, 2 B. & Ald. 551, and the proposition "that a verbal gift of chattels, unaccompanied with delivery of possession, passes no property to the donee" as being good law and without expression of any doubt. In 1849, in the case of Shower v. Pilck, 4 Exch. 478, the same question came before the Court of Exchequer, and the court without hesitation affirmed the ruling of Lord Truro (then Wilde, C, J.,) at *nisi prius*, and adopted the rule of Irons v. Smallpiece, 2 B. & Ald. 551. The alleged gift in question was *per verba de futuro*, but in respect of chattels then in the possession of the intended donee. The gift was held open to both objections. "To pass the property," said Alderson, B., "there must be both gift and a delivery; here there is hardly a gift." "There must be a delivery to make the gift valid," said Lord Cranworth (then Rolfe, B.); "here there is a mere statement that the goods which the defendant has in her possession the owner will give her." Again (in 1865) in Bourne v. Fosbrooke, 18 C. B. (N. S.) 515, Erle, C. J. adopted the rule in Irons v. Smallpiece, 2 B. & Ald. 551, as undoubted law; and in 1870, in Douglas v. Douglas, 22 L. T. Rep. (N. S.) 127, the Court of Exchequer declined to consider whether they should overrule that case, and expressed a decided leaning in its favor. In Ireland, in like manner, the doctrine has been asserted, Lord Plunkett, as lord chancellor, holding delivery to be the only admissible evidence of the gift of a personal chattel. Patterson v. Williams, L. & G. temp. Plunkett, 95. We have thus a great body of authority in favor of the necessity of delivery: but, on the other hand, there are several authorities which require consideration. The first note of dissent was sounded in the year 1841, or twenty-two years after the decision of the case Irons v. Smallpiece, 2 B. & Ald. 551, by Sergeant Manning in a note on the case of the London and Brighton Railway Company v. Fairclough, 2 M. & G. 691, in which he impugned the accuracy of Irons v. Smallpiece, and asserted that after the acceptance of a gift by parol the estate is in the donee without any actual delivery of the chattel. The authorities cited in that note we shall hereafter consider. In 1845, in Lunn v. Thornton, 1 C. B. 379, Maule, J., interlocutorily observed that he had always thought Lord Tenterden's opinion in Irons v. Smallpiece very remarkable, because by referring to instruments of gift he left it to be inferred that an assignment might be otherwise than by deed. But beyond this his criticism did not proceed. To the report of this case Sergeant Manning appended a note similar to that in the second volume of Manning and Granger. Two years afterward (1847) Lord Wensleydale, in Ward v. Audland, 16 M. & W. 862, quoted the passage from Lord Tenterden's judgment already cited, and observed "that is not correct." To which counsel replied by referring to the criticism of Maule, J., and the learned judge made no further

observation. The criticism of the two learned judges was probably directed to the same point, namely, the use of the expression, "deed or instrument." Lord Cranworth was present as a baron of the Exchequer during the argument in Ward v. Audland, and, as we have seen, two years afterward unhesitatingly adopted Irons v. Smallpiece, and that without note or comment—a course which he would hardly have pursued if he knew that Lord Wensleydale considered the case itself bad law. In 1852, in the case of Flory v. Denny, 7 Exch. 581, where the authorities lastly cited were mentioned, Lord Wensleydale referred to the two notes of Sergeant Manning, and read a portion of the latter, but expressed no opinion as to the correctness or incorrectness of the conclusion. In 1861 the case of Winter v. Winter, 4 L. T. Rep. (N. S.) 639, came before the Court of Queen's Bench. In that case a barge belonging to a father had been in the actual possession of his son as his servant. The father gave the barge to the son, and he subsequently, with the father's knowledge and assent, possessed and worked the barge as his own, and paid the wages of the crew. Wightman, J., upheld the title of the son on the ground of a change in the possession consequent on the gift. Crompton, J., on the ground that actual delivery of the chattel is not necessary to a gift *inter vivos*, and that it was sufficient that the conduct of the parties showed that the ownership had been changed. Lord Blackburn (then Blackburn, J.) simply concurred. What, however, is most to our present point, Crompton, J., said that although Irons v. Smallpiece, and Shower v. Pilck, *ubi sup.*, had not been overruled, they had been hit hard by the subsequent cases. In 1883 the case of Dandy v. Tucker, 31 W. R. 578, came before Pollock, B., sitting as a judge of the Chancery Division, and he declined to follow the decision of Irons v. Smallpiece, saying that he "certainly could not accede to the proposition generally that the actual delivery of a chattel is necessary to create a good gift *inter vivos*." "The question to be determined," he said, "is not whether there has been an actual handing over of property manually, but whether, looking at all the surrounding circumstances of the case, and looking particularly at the nature and character of the chattel which is proposed to be given, there has or has not been a clear intention expressed on the part of the donor to give and a clear intention on the part of the recipient to receive and act upon such gift. Whenever such a case should arise again, I am confident that that would be the basis of the decision of a court of common law, and of course, the same result would follow in a court of equity." Lastly in (1885), Cave, J., in the case of *Re* Ridgway, 15 Q. B. Div. 447, expressed his opinion "that it is going too far to say that the retention of possession by the donor is conclusive proof that there is no immediate present gift; although, undoubtedly, unless explained or its effect destroyed by other circumstances, it is strong evidence against the existence of such an intention." These two latter authorities have been followed by Lopes, L. J., in the case now before us, feeling that when sitting as a judge of the first instance he could not rightly depart from them. There is thus some difference of judical opinion as to the rule stated in Irons v. Smallpiece. We cannot think that the few recent decisions to which we have referred are enough to overrule the authority to that decision, and the cases which have followed it: but they make it desirable to inquire whether the law as declared before 1819, was in accordance with that decision, or with the judgment of Pollock, B., in Danby v. Tucker, *ubi sup.* This inquiry into the old law on the point is one of some difficulty, for it leads into rarely-trodden paths, where (as is very natural) we have not had the assistance of counsel, and where the materials for knowledge are for the most part undigested. The law enunciated by Bracton in his book "*De acquirendo rerum domino*," seems clear to the effect that no gift was complete without tradition of the subject of the gift. * * * In Bracton's day, seizin was a most important element of the law of property in general; and however strange it may sound to jurists of our day and country, the lawyers of that day applied the term as freely to a pig's ham (select Pleas in Manorial Courts, p. 142; see also Professor Maitland's papers on the Seizen of Chattels, the Beatitude of Seizin, and the Mystery of Seizin; Law Quarterly Rev., I. 324; II, 484; IV. 24, 286) as to a manor or a field. At that time the distinction between real and personal property had not yet grown up; the distinction then recognized was between things corporeal and things incorporeal; no action could then be maintained on a contract for the sale of goods, even for valuable consideration, unless under seal; the distinction so familiar to us now between contracts and gifts had not fully developed itself. The law recognized seizin as the common incident of all property in corporeal things, and tradition or the delivery of that seizin from one man to another as essential to the transfer of the property in that thing, whether it were land or a horse, and whether by way of sale or of gift, and whether by word of mouth or by deed under seal. This necessity for delivery of seizin has disappeared from a large part of the transactions known to our law; but it has survived in the case of feoffments. Has it also survived in the case of gifts? It has been suggested that Bracton, whilst purporting to enunciate the law of England, is really copying the law of Rome. But by the law of Rome, at least since the time of Justinian, gift had been a purely consensual transaction, and did not require delivery to make it perfect. Inst. II, VII. Coming next to the great law-writers of the reign of Edward I, they hold language substantially the same as that of Bracton, except indeed that the difference between transactions purely voluntary, or for pecuniary consideration, appears to be growing

somewhat more important. "*Donatio*," says Fleta, "*est quædam institutio quæ ex mera liberalitate, nullo jure cogente, procedit, ut rem a vero ejus possessore ad alium transferatur. Dare autum est rem accipientis facere cum effectu alioquin inutilis erit donatio, cum irritari valeat et revocari.*" Lib. III, chap. 3. He then proceeds to discuss various kinds of gifts, and says: "*Alia perfecta, et alia incepta et non perfecta; ut si donatio lecta fuerit et concessa et homagioum captum ac traditio nondem fuerit subsecuta.*" Loc. cit.; see also lib. III, chap. 15. In liber III, chapter 7, he discusses the necessar elements of donations, and, amongst other things, the effect of duress on a gift; and here the necessity of delivery is again clearly shown, because, according to Fleta, a promise made without duress followed by delivery under duress is not a valid gift. "*Refert tamen*," he says, "*utrum metus præveniat donationem vel svbsequatur, quia si primo coactus, et per mentum compulsus promisero et postea gratis tradidero, talis metus non excusat; sed si gratis promisero et compulsus tradidero tunc excusat metus.*" Britton held substantially the same language. In citing him we shall prefer the translation of Mr. Nichols to the Norman French of the original. In his chapter on Gifts (lib. II, chap. 3), he gives a very clear description of the nature of a gift. "A gift," he says, "is an act whereby any thing is voluntarily transferred from the true possessor to another person, with the full intention that the thing shall not return to the donor, and with full intention on the part of the receiver to retain the thing entirely as his own without restoring it to the giver. For the gift cannot be properly made, if the thing given does not so belong to the receiver that the two rights, of property and of possession, are united in his person, so that the gift cannot be revoked by the donor, or made void by another, in whom the lawful property is vested." Pp. 220, 221. And again (lib. II, chap. 3): "Some gifts are complete where both rights unite in the purchaser; others are begun, and not completed; and such titles are bad, as in case of gifts granted whereof no livery of seizin follows." Pp. 225-226. Passages of similar import will be found in liber I, chapter 29, and liber II, chapter 8. The third writer of the age of Edward I. is one of a very different character from Fleta and Britton—we mean Horn, the author of the Mirror of Justices; he attacked the judges and the administration of the law in his days with a vehemence which it is to be hoped was undeserved. But though amongst the one hundred and fifty-five abusions or abuses of the law which stirred his soul to wrath, some relate to seizin, yet he has nothing to say at variance with his contemporaries on the necessity of delivery; but on the contrary, expressly affirms that "the law requires but three things in contracts: 1. The agreement of the wills. 2. Satisfaction of the donor. 3 Delivery of the possession and gift." Chap. 5, § 1, par. 75. In the reign of Edward IV. a step seems to have been taken in the law relative to gifts which resulted in this modification; that whereas under the old law a gift of chattels by deed was not good without the delivery of the chattels given, it was now held that the gift by deed was good and operative until dissented from by by the donee. Thus, in Michaelmas Term, 7 Edw. IV. p. 21, fol. 20, it was held by Choke and other justices that if a man executed a deed of gift on his goods to me that this is good and effectual without delivery made to me, until I disagree to the gift and this ought to be in a court of record. In Hilary Term, 7 Edw. IV. pl. 14, fol. 29, it was alleged by counsel (Catesby and Pigot) that if a man give to me all his goods by a deed, although the deed was not delivered to the donee, nevertheless the gift is good, and if he chooses to take the goods he can justify this by the gift, although notice has not been given to him of the gift; and further, that if the donee commit felony before notice, etc., still the king will have the goods, and although notice may be material, nevertheless when he has notice, this would have relation to the time of the gift, etc. But the court said that such a gift is not good without notice, for a man cannot give his goods to me against my will. An earlier case in the same reign has been cited as bearing on the present question. In Michaelmas Term, 2 Edw. IV. pl. 26, fol. 25, a case arose on trespass of goods, in which Laicon was counsel for the defendant, and the court was engaged in considering the sufficiency of his pleas. In the course of the discussion Laicon put this question, "Suppose I give to you my goods, which are at Everwike, and before that you are seized of them, a stranger takes them away, have you not a wait of trespass against the stranger?" Which he then proceeds to answer: "Yes sir, for by the gift at once the property was in you and the possession by the writ is adjudged in you presently." Danby, the chief justice of the Common Pleas, seems to have assented, apparently on the ground that pleading to such a writ by way of justification would confess the possession of the plaintiff and the taking by the defendant (*car la vous pled. vr.* matter accord *et justif et vous confess prisee hors de son poss.*) But immediately after this discussion Laicon found his argument so hopeless (*videns opinionem curiæ contra eum*) that he seems to have amended his pleadings. This case seems to us of no authority on the point under investigation. What was said was not in discussion of what really passed by the gift, but only of the effect of pleading in preventing the denial of the plaintiff's possession. The question seems to an effectual gift of goods without possession, but there is nothing to show whether the parties to the discussion had in contemplation a gift by deed or not. The cases already referred to which occurred a few years later seem to show that the effect of a deed in passing the property without delivery of the chattel was claiming the attention of the lawyers of that day. Brooke, in his Abridgment ("Tres

pass," 303), cites this case of the 2 Edward IV. and seems to put it upon a somewhat different ground to the Year-Book itself. He says that Danby agreed in Laicon's argument, "for by the gift the property is in him, and then the law adjudges possession, which was not denied, and it seems to be the law, because goods are transitory whilst land is local." We can find no authority for these reasons in the entry which he professes to be abstracting. This case, as explained by Brooke seems to underlie the proposition asserted twice in the case of Hudson v. Hudson, Latch. 214, 263, discussed in 2 Wms. Saunders, 47, 6, *a*, to illustrate the right of an executor to sue in trover before actual possession. If, it was said, a man in London gives to me his goods in York and another take them I can bring trespass; for property, it was added, draws possession in chattels personal. The court were not considering what gift of chattels did carry the property but only illustrating the proposition that where the property has passed, as by will to the executor, there the law attracts to it possession. This would be perfectly illustrated by the case of chattels in York transferred by deed executed in London. The whole supposition that this case lends any countenance to the notion that chattels can pass without delivery seems to be derived from the silence of the case as to the way in which the gift was made; and this point was not material to the matter under consideration by the court. Moreover, where a legal result could only be produced by a deed our elder law-writers were, we believe less apt to mention the deed than their less technical descendants. One other case in the the reign of Edward IV. must be mentioned. In Michaelmas Term, 21 Edw. IV. pl. 27, fol. 55, it was said by Brian, J., that in detinue of chattels it was a good plea to say that the plaintiff after the bailment gave them to the defendant ane then he could have his law—*quod fuit concessum*. The case appears to go only to this, that if A, after bailing a chattel to B, then gives it to B, B might defend himself by his suit in an action of detinue. If good law, it seems to establish that delivery first and gift afterward is as effectual as a gift first and delivery afterward. One case in the reign of Henry VII perhaps requires consideration (Hilary Term, 21 Hen. VII., pl. 30, fol. 18). The question seems to have been whether the use of land was presently transferred by a bargain and sale, and in the course of the report the following passage occurs: "If I give to a man my cow or my horse, he may take the one or the other at his election; and the cause is that immediately by the gift the property is in him, and that of the one or the other at his will; but if the case were that I will give to him a horse or a cow in future time, then he cannot take either the one or the other, for then it is in my election to choose which of them I will give him." The case is interesting as the first one which we have found which emphasizes the distinction in gifts between words in the present and in the future tense. But the passage we have cited appears to have no real weight of authority. It is only part of the argument of the attorney-general, and the argument does not appear tenable; for surely it is open to question whether the gift, even a grant for valuable consideration, of one or other of two things at the election of the donee or grantee, can pass the property in one or other or both of these things immediately and before the election of the grantee. It is further to be observed that the question before the court turned on the doctrine of election; and whether the supposed gift was to be by deed or not is a point on which the report is silent. This silence is the only reason why the passage has been thought by some persons relevant to the present inquiry. It was in the reigns of the early Tudors that the action on the case on *indebitatus assumpsit* obtained a firm foothold in our law; and the effect of it seems to have been to give a greatly increased importance to merely consensual contracts. It was probably a natural result of this that, in time, the question whether and when property passed by the contract came to depend, in cases in which there was a value consideration, upon the mind and consent of the parties, and that it was thus gradually established that, in the case of bargain and sale of personal chattels, the property passed according to that mind and intention, and a new exception was thus made to the necessity of delivery. This doctrine that property may pass by contract before delivery appears to be comparatively modern. It may, as has been suggested, owe its origin to a doctrine of the civil law that the property was at the risk of the purchaser before it passed from the vendor; but at any rate the point was thought open to argument as late as Elizabeth's reign. See Plowd, 11 *b*, and see a learned note, 2 Man. & Ry. 566. Flower's Case (which seems to have been decided in 39 Elizabeth [see p. 59] appears to show that the necessity of delivery was then upheld by the court. The case is thus stated by Noy (p. 67): "A borrowed £100 of B and at the day brought it in a bag and cast it upon the table before B, and B said to A, being his nephew, I will not have it, take it you and carry it home again with you. And by the courts that is a good gift by parol, being cast upon the table. For then it was in the possession of B, and A might well wage his law. By the court, otherwise it had been, if A had only offered it to B, for then it was *chose in action* only, and could not be given without a writing." The court seems to have held that delivery was necessary, but that by the casting of the money on the table it came into the possession of the uncle, and that the nephew taking the money in his uncle's presence and by his direction there was an actual delivery by the uncle to the nephew —so that the nephew might wage his law, *i. e.*, might conscientiously swear that he was not indebted to his uncle. See the case discussed in Douglas v. Douglas *ubi sup.* In Jenkins' Centuries (3d century case IX) it is said: A gift of anything without a consideration

is good; but it is revocable before the delivery to donee of the thing given. *Donario perficitur possessione accipientis.* This is one of the rules of law"—a statement made with little reference to the other matters treated of in the case. We know of no other authority exactly to the same effect as this, nor is it stated as having the authority of any judicial decision. Blackstone's discussion of the subject of gifts of chattels is perhaps not so precise as might be desired; but his language does not seem to essentially to differ from the earlier authorities: "A true and proper gift or grant is," he says: "always accompanied with delivery of possession and takes effect immediately. But if the gift does not take effect by delivery of immediate possession, it is then not properly a gift, but a contract; and this man cannot be compelled to perform." Book 2, chap. 30. In 1818, the year Irons v. Smallpiece, *ubi sup.*, was decided, the then master of the rolls, Sir Thomas Plummer, in Hooper v. Goodwin, 1 Sw. 485, said: "A gift at law or in equity supposes some act to pass the property: in donations *inter vivos* * * * if the subject is capable of delivery." These are, so far as we can find, all the relevant authorities before the decision in Irons v. Smallpiece, though they are not all the authorities that have been cited as relevant. But several that have been relied upon appears to us to have no real bearing on the point at issue. Thus, in Wortes v. Clifton, Roll. 61; Mich., 12 James I, Coke *arguendo* uses as an illustration of the difference between the civil law and ours—that in the civil law a gift is not good without tradition—but that it is otherwise in our law. Here, for aught that appears, the gift which the learned counsel referred to as good without delivery is a gift by deed. In like manner several authorities which affirm that a gift of chattles may be good without deed and are silent as to delivery (Perkins' Profitable Book "Grant," 57; 2 Shep. Touchs. 227; Comyn dig. "Biens," D. 2) have been cited as if they likewise asserted that a gift was good without delivery—a proposition which they do not affirm, or, as we think, imply. This review of the authorities leads us to conclude that according to the old law, no gift or grant of a chattel was effectual to pass it, whether by parol or by deed, and whether with or without consideration, unless accompanied by delivery; that on that law two exceptions have been grafted, one in the case of deeds, and the other in that of contracts of sale where the intention of the parties is that the property shall pass before delivery; but that, as regards gifts by parol, the old law was in force when Irons v. Smallpiece was decided; that that case therefore correctly declared the existing law; and that it has not been overruled by the decision of Pollock, B, in 1883, or the subsequent case before Cave, J. We are therefore unable in the present case to accept the law on this point as enunciated by Lopes, L. J., in deference to the two latest decisions. But assuming delivery to be necessary in the case of the gift of an ordinary chattel, two questions would remain for consideration in the present case; the first, whether the undivided fourth part of the horse admits of delivery, or whether on the other hand it is to be regarded as incorporeal and incapable of tradition the other, whether the letter written by Benzon to Yates was either a constructive delivery of this undivided fourth part of the horse, or an act perfecting the gift of this incorporeal part so far as the nature of the subject-matter of the gift admits. On these points we do not think it needful to express any decided opinion because in our judgment what took place between Benzon and Cochrane before Benzon executed the bill of sale to Cochrane constituted the latter a trustee for Moore of one-fourth of the horse Kilworth. Another objection to Cochrane's title was based on the bill of sale, which bore date the 26th of July, 1888, and stated the consideration as a sum of £7,575, then owing by Benzon to Cochrane and of the further sum of £2,425, then paid by Cochrane to Benzon, making togther a sum of £10,000; whereas in fact at the date of the bill of sale Benzon was only indebted to Cochrane on two promissory notes then current and payable respectively in August and September, and for sums amounting together to £8,300. It is said that by an agreement arrived at at the time that this £8,300 due *in futuro* was to be taken as between the parties as represented by the sum of £7,575; but if so, this agreement should in our opinion have been stated in the bill of sale, and we are therefore of opinion that the document was void as not truly stating the consideration for which it was given. For these reasons we are of opinion that this appeal should be dismissed with costs.

NOTE.—The opinion in the principal case contains a careful and thorough review of the English authorities upon the subject of parol gifts of chattels and the necessity of delivery in order to complete the gift, and the writer proposes in this note to review the American authorities upon the same subject.

There is less apparent conflict among the American cases upon this subject than there seems to be among the English cases. The general rule is well settled that to constitute a valid parol gift of chattels there must be actual or constructive delivery, so as to confer the right of enjoyment *in præsenti*.[1] As said by Mr. Schouler, "The general rule is to require the utmost delivery of which the thing is capable."[2] The delivery need not be simultaneous with the words of

[1] Bennett v. Cook, 27 Cent. L. J. 90, and note 92; Gano v. Fisk, Cent. L. J. 299, and note; "The Recent Law of Gifts," 28 Cent. L. J. 400; "Gifts *Inter Vivos*," 19 Cent. L. J. 422; Sanborn v. Goodline, 28 N. H. 48, 59 Am. Dec. 398; Dole v. Lincoln, 31 Me. 428; Young v. Young, 80 N. Y. 422, 36 Am. Rep. 634; Brantley v. Cameron, 78 Ala. 72; Nolen v. Harden, 43 Ark. 307, 51 Am. Rep. 563; Taylor v. Staples, 8 R. I. 170; Spencer v. Vance, 37 Mo. 427; Vogel v. Gast, 20 Mo. App. 104; Brewer v. Harvey, 72 N. Car. 176; Schick v. Grote, 7 Atl. Rep. 852; Smith v. Ferguson, 90 Ind. 229; Bedell v. Carll, 33 N. Y. 581; Coleman v. Parker, 114 Mass. 330.

[2] 2 Sch. Pers. Prop. § 75. See also Woodruff v. Cook, 25 Barb. 505; Hatch v. Atkinson, 56 Me. 324; 3 Walt Act. & Def. 505.

the gift, but may either precede or follow them.[3] Nor is it necessary that the delivery should be made directly to the donee, for it may be made to a third person for him.[4] It was, however, held in a recent case by the Supreme Court of Wisconsin that when an agent has been instructed to collect certain rents belonging to his principal and pay them to another, who has no notice of the instruction, and the rents when collected are not paid to him, the property in the money does not pass to such third person.[5] Where the donee is already in possession, manual or visible delivery is not generally required.[6] So, where the chattels or things given are so bulky or so situated that they cannot well be moved or taken in hand, actual manual delivery may be dispensed with.[7] Delivery may also be made, in certain cases, symbolically, as by turning over to the donee the key of a chest or warehouse where the goods are situated.[8]

Illustrative cases showing what has been held sufficient to constitute a delivery within the general rule will be found in the note to the case of Bennett v. Cook, reported in a former volume of this JOURNAL.[9] There are other cases, however, which are so close to the border line that they seem to infringe upon the general rule requiring delivery, if, indeed they do not violate it. The rest of this note will be devoted to a consideration of those cases. Where one in his own house in the presence of witnesses, gave his son a carriage which was at the time locked up in a building on the same farm, it was held that the delivery was sufficient to complete the gift.[1] So, when a father procured a certain brand with which he branded cattle in the name of his child, under circumstances showing an intention to give them to the child, the gift was held valid.[11] In another case a father, intending to make his son a gift, executed and delivered to him a receipt for a portion of a debt secured by mortage against the son, this was held a valid gift, although no indorsement was ever made upon the mortgage.[12] A slave owner gave to her sister a negro girl, saying to the girl, in the sister's presence, "There is your mistress; you must be a good girl and obedient to her," and this was held a sufficient delivery.[13] It is held by the Supreme Court of Michigan that an executed gift of furniture from a mother to a son may be inferred from evidence of declarations of such an intent on her part, and the remaining of the son in her house where the furniture was placed until her death.[14] Other courts have made similar rulings under like circumstances.[15] But it was held in Iowa, where a piano, which had been given to the plaintiff by her grandmother, remained in the house of the latter, that, although the plaintiff used it, the gift was not accompanied by such delivery as would enable the plaintiff to maintain an action of replevin for the piano after it had passed into the hands of a third person.[16] In Louisiana it is held, under a peculiar provision of the civil code of that State, that a donation *inter vivos*, duly accepted by the donee, need not be accompanied by actual delivery.[17] In Connecticut, in a case where a wealthy and childless widow desposited a sum of money in her own name as trustee for the child of a friend, and soon afterwards told the child's parents of her act and spoke of the money as belonging to him, although she afterwards drew out the money for her own use, and died leaving a will in which no mention was made of the child or the desposit, it was held that the deposit was a completed gift and that the depositor could not revoke it.[18] The presumption of a gift between husband and wife or parent and child is said to be stronger than between strangers.[19] And after the gift is completed by delivery it is not necessary that the donee should retain possession of the property,[20] although in case of a gift *causa mortis*, it has been held that if the property again comes into the possession of the donor the presumption is that the gift was revoked.[21]

W. F. ELLIOTT.

[3] Carradine v. Carradine, 58 Miss. 286, 38 Am. Rep. 287.

[4] Devol v. Dye, 123 Ind. 322; Beals v. Cooley, 59 Cal. 665; Hill v. Stevenson, 53 Me. 364, 18 Am. Rep. 231; Meriwether v. Morrison, 78 Ky. 572; Gilman v. McArdle, 99 N. Y. 451.

[5] Wells v. Collins, 74 Wis. 341, 43 N. W. Rep. 160. See also Sessions v. Moseley, 4 Cush. 87; Dickeschild v. Exchange Bank, 28 W. Va. 340. Compare Martin v. Funk, 75 N. Y. 134.

[6] Tenbrook v. Brown, 17 Ind. 410; Wing v. Merchant, 57 Me. 383; Ross v. Draper, 55 Vt. 404, 45 Am. Rep. 624, and note; Bennett v. Cook, 27 Cent. L. J. 90, and note.

[7] Nolen v. Harden, 43 Ark. 307, 51 Am. Rep. 563, 564; Boyan v. Finlay, 19 La. Ann. 94; Allen v. Cowan, 23 N. Y. 502; Kellogg v. Adams, 51 Wis. 138; Tierney v. Corbett, 2 Mackey (D. C.), 264.

[8] Marsh v. Fuller, 18 N. H. 360; Noble v. Smith, 2 Johns. (N. Y.) 52; Hunter v. Hnuter, 19 Barb. 631; Stephenson v. King, 81 Ky. 425, 50 Am. Rep. 172. *Contra* Hatch v. Atkinson, 56 Me. 324, 96 Am. Dec. 364.

[9] Bennett v. Cook, 27 Cent. L. J. 90, note on page 92.

[10] Fletcher v. Fletcher, 55 Vt. 325. See also Ross v. Draper, 55 Vt. 404, 45 Am. Rep. 624. See also Poullain v. Poullain (Ga.), 4 S. E. Rep. 81.

[11] Hillebrant v. Brewer, 6 Tex. 45.

[12] Carpenter v. Soule, 88 N. Y. 251, 42 Am. Rep. 248. Compare Brunn v. Schuett, 59 Wis. 260.

[13] Waring v. Edmunds, 11 Md. 424.

[14] Harris v. Hopkins, 43 Mich. 272, 38 Am. Rep. 180.

[15] Allen v. Cowan, 23 N. Y. 502; Ross v. Draper, 55 Vt. 404, 45 Am. Rep. 624.

[16] Willey v. Backus, 52 Ia. 401.

[17] Rauxet v. Rauxet, 38 La. Ann. 669.

[18] Minor v. Rogers, 40 Conn. 512, 16 Am. Rep. 69. For other cases of gifts by depositing money, opening accounts, etc., in the name of or as trustee for another. See Millspaugh v. Putnam 16 Abbott's Pr. 380; Gardner v. Merritt, 32 Md. 78; Howard v. Savings Bank, 40 Vt. 597; Hill v. Stevenson, 63 Me. 364; Eastman v. Woronoso Savings Bank, 136 Mass. 208; Alger v. North End Savings Bank, 146 Mass. 418; Smith v. Bank (N. H.), 9 Atl. Rep. 792. Compare Burton v. Bridgeport Savings Bank, 52 Conn. 398; Brabrook v. Boston, etc. Bank, 104 Mass. 228; Taylor v. Henry, 48 Md. 550; Curry v. Powers, 70 N. Y. 212; Schick v. Grote, 47 N. J. Eq. 352. See also note to Bennett v. Cook, 27 Cent. L. J. 90, 92.

[19] McClure v. Lancaster, 24 S. Car. 273, 58 Am. Rep. 259. See also Love v. Francis, 5 West. Rep. 758; Brown v. Brown, 40 Hun, 418; Nichols v. Edwards, 16 Pick. 62; Hollowell v. Skinner. 4 Ired. (N. Car.) L. 165; Betts v. Francis, 30 N. J. L. 152; Cerney v. Pawlot, 66 Wis. 262; Martrich v. Linfield, 21 Pick. 325; Harris v. Hopkins, 43 Mich. 272, 38 Am. Rep. 180; Kellogg v. Adams, 51 Wis. 138, 37 Am. Rep. 815.

[20] Whitford v. Horn, 18 Kan. 455; Ector v. Welch, 29 Ga. 554; Ivey v. Owens, 28 Ala. 641.

[21] Cutting v. Gilman, 41 N. H. 147; Emery v. Clough, 63 N. H. 552. See also McCord v. McCord, 77 Mo. 166.

RECENT PUBLICATIONS.

A TREATISE ON THE LAW OF FRAUD ON ITS CIVIL SIDE. By Melville M. Bigelow, Ph.D., Harvard. Volume II. Boston: Little, Brown & Company. 1890.

The present volume is the second of a series of which the first volume, which appeared in 1888, treated of

constructive fraud, deceit etc. The volume now at hand is in effect a new edition of a smaller work by Mr. Bigelow, published in 1877. While the first volume treats of the subject of deceit or what Mr. Bigelow practically calls "deception," the volume now at hand treats of what he terms "circumvention." He divides fraud on its civil side into two parts. In the one, the person defrauded and the person defrauding have been dealing with each other; that part is "deception" or actual deceit. In the other they have not been dealing with each other and that part he calls "circumvention" which is practically the subject of this book. He says in the preface that under the head of circumvention, all except special cases turning upon peculiar statutes or upon peculiar circumstances may be summed up in the statement that personal intention to defraud is necessary only when the party complaining of fraud, canno tmake out his case by any external act or conduct. the transaction is innocent on the external facts which brought it into existence and constitute it, nothing, it is obvious, can be done unless the complaining party can prove that it was founded in personal intention to defraud. Whether the definition of the subject of fraud, as given by Mr. Bigelow, is or is not correct and whether the subject is logically susceptible of division into the two classes as divided by him matters little, provided the treatment of each subject is complete and satisfactory. The first chapter of the book will engross the reader's attention on account of the novel treatment of the subject of what constitutes circumvention, the sum and substance of which is, that fraud consists in endeavor to alter rights by deception touching motives or by circumvention not touching motives. Deception here consists in endeavor to alter rights by creating wrongfully a false impression upon one's mind in a matter in which the one deceived is a party with the wrong-doer. Circumvention consists in endeavor to alter rights by wrongfully evading the law in a matter in which the person to be wronged is not a party. Under the head of circumvention is treated, first, the evasion of law under the statutes of Elizabeth; second, evasion of law by preference, bankruptcy laws; third, evasion of process; fourth, evasion of law in other ways. Beyond the novelty of its treatment the book will be found of great interest as comprehending the distinctive law and decisions upon the subject of fraud on its civil side. In reading it one cannot but be struck with the completeness of the work and the tendency of the author to enter into the discussion of cases and questions minutely and discriminatingly.

THE AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW, Compiled under the Editorial Supervision of John Houston Merrill, Late Editor of the American and English Railroad Cases, and the American and English Corporation Cases. Vols. XII. and XIII. Northport, Long Island, N. Y.: Edward Thompson Company, Law Publishers. 1890.

Each volume of this series, as it comes to us, gives additional evidence of its thoroughness and accuracy. Volume 12 contains nearly two hundred pages upon the subjects of judgments and judicial sales—almost a law book in itself, a well considered paper on the subject of jurisdiction, a thorough review of the authorities and the law upon the subjects of justice of the peace, landlord and tenant, larceny, and lease. Volume 13 treats very fully upon the subject of legacies and devises, libel and slander, license, lease, life insurance, limitation of actions, *lis pendens*, livery stable keepers, logs and lumber, lost papers, and lotteries. As we have frequently remarked, the series is invaluable to the practitioner, especially those without access to a large law library; and even with a large law library at hand the ability, on a moment's notice, to gather the authorities upon questions suddenly presented serves to demonstrate the general value of the series.

BOOKS RECEIVED.

THE AMERICAN STATE REPORTS, Containing the Cases of General Value and Authority, Subsequent to Those Contained in the "American Decisions" and the "American Reports," Decided in the Courts of Last Resort of the Several States, Selected, Reported, and Annotated By A. C. Freeman and the Associate Editors of the "American Decisions." Vol. 15. San Francisco: Bancroft-Whitney Company, Law Publishers and Law Booksellers. 1890.

THE SUPREME COURT OF THE UNITED STATES, Its History and Influence in Our Constitutional System. By Westel W. Willoughby, Fellow in History, Johns Hopkins University, Baltimore: The Johns Hopkins Press. 1890.

THE GREEN BAG, a Useless but Entertaining Magazine for Lawyers, Edited by Horace W. Fuller. Vol. II, Covering the Year 1890. Boston Book Company, Boston, Mass

THE AMERICAN DIGEST, Annual, (1890.) Being Vol. 4, of the United States Digest, Third Series Annual, also, the Complete Digest for 1890. A Digest of all the Decision of the United States Supreme Court, all the United States Circuit and District Courts, the Courts of Last Resort of all the States and Territories, and the Intermediate Courts of New York, Pennsylvania, Ohio, Illinois and Missouri, the U. S. Court of Claims, Supreme Court of the District of Columbia, etc., as Reported in the National Reporter System and Elsewhere, from January 1, to September 1, 1890. With Note of English Cases, *Memoranda*, of Statutes, Annotations in Legal Periodicals, etc., a Table of the cases Digested, and a Table of Cases Overruled, Criticised, Followed, Distinguished, etc., During the Year. References to the "State Reports" Given by an Improved Method of Topical Citation. Prepared and Edited by the Editorial Staff of the National Reporter System. St. Paul, Minn.: West Publishing Co., New York; Digest Publishing Co., 1890.

QUERIES.

QUERY NO. 1.

The Supreme Court of Iowa has recently held that land purchased with pension money is exempt from execution by virtue of the act of congress Rev. Stat. § 4747.

Question: Has congress power under the constitution to create such an exemption?

SUBSCRIBER.

QUERY NO. 2.

Is a type written will, duly signed and attested according to the law, valid? Good lawyers differ. In these days of the almost universal use of the type writer the question is important. Cite authorities, if there are any. J.

POETRY OF THE LAW.

SHORT V. STOTTS, 58 IND. 29.

Statute of Frauds.—A promise to marry is not void by the statute of frauds merely because it is not in writing.

"I promise by the moon and tides
That love and move in sweet accord;
I swear by the eternal sun,
By Gavin and by Hord—

I swear by the mysterious main,
And by the Code of '52,
Dear Maggie, if you'll wed with me,
That I will wed with you."

In Daviess County one still eve
So Samuel Short told Maggie Stotts;
Maggie responded "It's a go,"
And thought about it lots.

But Samuel forgot his vows,
So Maggie brought him into court;
Sam knew there had been nothing "writ"
And counted on some sport.

"The 29th of Charles the Tooth
Provides," said Sam by counsel bright,
"That Mag can't sue me on this trade
'Less it's in black and white."

But Worden, J., replied "This law
Don't touch the case where A agrees
To marry B but only hits
Them other promises—

Made *in consideration of*
A marriage, as though Mag should say
I won't have Sam unless he'll buy
Some peanuts circus day.

Promises like this last don't count
Unless they're wrote and signed;
The first are good without a scratch
(Such as the one in this yere match)
And we for Maggie find."

D. L. CADY.

HUMORS OF THE LAW.

A saloon-keeper of Elkhorn, Neb., was arrested recently, charge with selling liquor on the Sabbath. He was taken before a justice at Elkhorn for trial, and straightway moved for a change of venue.

"What's that?" the court asked.

"We don't want to be tried by you," Uthoff's attorney responded.

The judge looked at him in astonishment. Uthoff's attorney expected a fine for contempt of court, but he escaped that.

"I'd like to know why not?" the court remarked warmly.

"Well, we have an affidavit here to the effect that we feel that we cannot secure a fair and impartial trial. You're prejudiced."

"You're a liar."

"You're unfriendly to us."

"You're an infernal, no account, worthless liar. You and your client ought both to be in jail."

"We want to go before another court, anyway."

The justice rose up and roared.

"You make me tired, he cried. "Do you think this court is going to have you pawing all over the country like Dogknees looking for a man with a lantern to suit your pleasure? Think the law is a thing to be tried on like a suit of clothes? You sit down there and give your evidence."

Uthoff's attorney complied, and the result was his client was fined $100 and was sent to jail.

When a lady, giving evidence in a Kansas court, refused to answer a question, on the plea that it was not fit to tell decent people, her questioner blandly said: "Well, then, step up and whisper it to the judge."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ALIMONY—What Passes by Decree.—A growing crop, the annual result of agricultural labor, sown by a husband on his land pending a suit for divorce and alimony brought by his wife, passes by a decree which gives the land to the wife as alimony, although such crop is not, in terms, described or referred to in the decree.—*Herron v. Herron*, Ohio, 25 N. E. Rep. 420.

2. ALTERATION OF INSTRUMENTS—Pleading.—In a suit on a written instrument, an answer alleging that the instrument sued on was not the one executed by defendant, "for that the same has been altered since its delivery," does not require the plaintiff to offer the instrument in evidence, since the answer virtually admits its execution.—*Hagan v. Merchants' & Bankers' Ins. Co.*, Iowa, 46 N. W. Rep. 1114.

3. APPEAL—Joint and Several Judgment.—Where in an action against a copartnership judgment is rendered against all the partners, but on appeal it is reversed as to all but one, as to whom it is affirmed, the surety on the *supersedeas* bond is not released from liability.—*Bridgeford v. Fogg*, Ky., 14 S. W. Rep. 600.

4. ATTACHMENT—Bond for Release.—It is no defense in an action on an undertaking executed in consideration of the release of an attachment, and stipulating for the payment by defendant on demand of whatever

judgment should be recovered by plaintiff in the attachment suit, that, after the court ordered the attachment discharged and the property released, the sheriff refused to deliver up the goods, and retained possession thereof.—*Gardner v. Donnelly*, Cal., 24 Pac. Rep. 1072.

5. ATTACHMENT—Pleading.—A judgment for plaintiff in an action to recover personal property taken from him under a writ of attachment against a third person, wherein the only question litigated was whether the property in fact belonged to plaintiff or to the third person, is not an order discharging the attachment, within Code Iowa, § 3019, requiring an appeal from an order discharging an attachment to be perfected within two days thereafter.—*Linden v. Green*, Iowa, 46 N. W. Rep. 1108.

6. ATTACHMENT BOND—Attorneys' Fees.—Under Code Iowa, § 2961, a party who has recovered damages in such an action cannot, nearly a year after judgment has been rendered, and after it has been paid in full, have his attorney's fees taxed in the case on a mere allegation that through "some oversight" it was not taxed when the judgment was entered.—*Solomon v. McLennan*, Iowa, 46 N. W. Rep. 1083.

7. BAILMENT—Safe-deposit Company.—A safe-deposit company is liable for property taken from the vault of a renter by officers acting under a search-warrant, which does not describe the property found in the vault, but which, nevertheless, the officers take away. Such a taking is a trespass, which should have been prevented, if possible, by the officers of the company, or they should have used legal means to regain possession of the property.—*Roberts v. Stuyvesant Safe-deposit Co.*, N. Y., 25 N. E. Rep. 294.

8. BANKS AND BANKING—Collection.—A bank which collects a letter of credit, left with it for that purpose only, holds the proceeds as a trust fund, though it credits the amount to the owner on its books, and notifies him of the collection, and he does not at once demand his money, and where the bank deposits the proceeds with another bank, and afterwards makes an assignment for benefit of creditors, the owner of the letter of credit is entitled to be paid in full.—*Nurse v. Satterlee*, Iowa, 46 N. W. Rep. 1102.

9. BILL OF EXCHANGE—Alteration.—The acceptor of a bill of exchange, which has subsequently been rendered void by a material alteration, may maintain an action of replevin therefor against the holder..—*Smith v. Eals*, Iowa, 46 N. W. Rep. 1110.

10. BOUNDARIES—Platting Lands.—Where in a platted block the lots are marked on the plat as having the same number of front feet each, except one, the specific dimensions of which are also marked, and a survey shows that the whole block contains more front feet than are marked on the plat, the excess must be distributed between all the lots, and not given to that lot which differed in its dimensions from the rest.—*Pereles v. Magoon*, Wis., 46 N. W. Rep. 1047.

11. BOUNDARIES—Proceedings.—A proceeding to establish a disputed corner and boundary line, under Laws Iowa, 1874, ch. 8, is a special proceeding, reviewable on appeal to the supreme court, only on the errors assigned, and is therefore not triable *de novo* on such appeal as an equity case.—*Yocum v. Haskins*, Iowa, 46 N. W. Rep. 1065.

12. CARRIERS OF GOODS—Husband and Wife.—A common carrier is not liable for household goods seized while in its hands under an attachment against the consignor's husband, where it has notified the latter of the attachment on his presenting the bill of lading to its agent in time for him to assert the consignor's title to the goods before they are sold under the attachment, as it was entitled to rely on the presumption that he was the consignor's duly authorized agent in regard to the control of the goods, and it is immaterial by what means he obtained the bill of lading.—*Furman v. Chicago, L. I. & P. Ry. Co.*, Iowa, 46 N. W. Rep. 1049.

13. CARRIERS OF PASSENGERS—Tickets.—The going coupon of round-trip ticket provided that it would be void if detached. The coupons were accidentally detached, and the passenger presented both ends, and the conductor by mistake took the returning coupon when he should have taken the going coupon: *Held*, that this was a waiver of the condition on the going coupon in regard to detachment.—*Penn. Co. v. Dray*, Ind., 25 N. E. Rep. 439.

14. CERTIORARI—Jurisdiction of Supreme Court.—Under sections 2 and 3, art. 5, of the constitution of the State, the original jurisdiction of the supreme court includes the power to issue, hear, and determine a writ of *certiorari* under such regulations as may be prescribed by law, where judicial questions are involved affecting the sovereignty of the State, its franchises or prerogatives, or the liberties of its people.—*State v. Board County Com'rs*, S. Dak., 46 N. W. Rep. 1127.

15. CHATTEL MORTGAGES—Measure of Damages.—Where a mortgagee of chattels takes possesssion under a clause allowing him to do so, and wrongfully sells them before the maturity of the note secured, the measure of damages against him for the conversion is the difference between the price obtained, and the maket price at the time of the sale.—*Gravel v. Clough*, Iowa, 46 N. W. Rep. 1092.

16. CHINESE RESTRICTION ACT.—A vessel stolen from its owner, and used, while out of his control, without his knowledge or consent, in bringing Chinese laborers into the United States in violation of the law, does not for that cause become liable to seizure and forfeiture. To work a forfeiture of a vessel under the Chinese restriction act, the master must knowingly violate the statute.—*United States v. The Geo. E. Wilton*, U. S. D. C. (Wash.), 43 Fed. Rep. 606.

17. CONFLICT OF LAWS—Master and Servant.—In a suit brought in Tennessee by a servant against his employer for injuries received in Georgia, the law in Georgia as to contributory negligence prevails.—*East Tennessee, V. & G. R. Co. v. Lewis*, Tenn., 14 S. W. Rep. 603.

18. CONSTITUTIONAL LAW—Abolishing Old Counties.—Act Tenn. March 11, 1890, abolishing the county of James, and restoring its territory to the counties of Hamilton and Bradley, from which it was formed, is void under Const. Tenn. art. 10, § 4, providing for the formation of new counties with the consent of the voters of the territory taken to form such counties, and particularly prescribing how such new counties may be established, but giving no authority to abolish an old county entirely.—*James County v. Hamilton County*, Tenn., 14 S. W. Rep. 601.

19. CONSTITUTIONAL LAW—Judgment in Sister State.—Const. U. S. art. 4, § 1, requires that "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State:" *Held* that, when, in an action upon a judgment rendered in another State, it is determined that the court had jurisdiction, no question can be made as to whether service was had according to the laws of such State, or, when the judgment on its face bears interest, whether the laws of such State allow interest on judgments.—*Hall v. McKay*, Tex., 14 S. W. Rep. 615.

20. CONTRACT—Construction.—Where defendant lets a logging contract to plaintiffs, and after it is partly performed releases them from completing it in consideration of their truning over to him the camps and giving up the benefit of the contract, and agrees to pay them a certain sum per 1,000 feet for the logs they had already gotten out as soon as he should ship them to market, he is bound to pay this sum notwithstanding the subsequent destruction of the logs by fire before they are shipped out.—*Lupton v. Freeman*, Mich., 46 N. W. Rep. 1042.

21. CORPORATION—Officers and Agents.—The president of a corporation, who had served without agreement as to pay, sold his stock to three persons, who thereby acquired control of the corporation, and made themselves directors. They then voted a sum of money to

the president for his past services, and paid the money to him in part consideration for their stock: *Held*, that they were liable for said sum to the receiver of the corporation, since the president was not entitled to salary.—*Ellis v. Ward*, Ill., 25 N. E. Rep. 530.

22. CORPORATION—Stock Subscription.—Where a subscription for corporate stock is obtained by the representation that a prominent business man has subscribed for a large amount, and the fact that he paid nothing for his stock is concealed, such concealment makes the representation fraudulent.—*Coles v. Kennedy*, Iowa, 46 N. W. Rep. 1088.

23. CORPORATIONS — Subscription to Stock.—Complainants subscribed to the capital stock of a corporation without knowing that, by a fraudulent contract between the corporation and one of its officers, its stock had already been issued to such officer to be by him transferred to the subscribers on payment to him of 40 per cent. of its par value: *Held*, that the existence of such contract did not change complainants from subscribers to assignees of the stock.—*Bates v. Great Western Tel. Co.*, Ill., 25 N. E. Rep. 521.

24. COUNTY ATTORNEY—Salary.—Under Acts 21st Gen. Assem. Iowa, ch. 73, § 11, the supervisors cannot increase, during his term of office, the salary of their county attorney as fixed by them at such June meeting, previous to his election, though such salary was so fixed under a mistaken belief that he was also entitled to fees in criminal cases.—*Goetzman v. Whitaker*, Iowa, 46 N. W. Rep. 1058.

25. COURTS—Jurisdictional Amount—Quieting Title.—For the purpose of determining the jurisdictional amount in a bill to quiet title, the whole value of the property, the possession or enjoyment of which is threatened by defendant, is the measure of the value of the matters in controversy.—*Lehigh Zinc & Iron Co. v. New Jersey Zinc & Iron Co.*, U. S. C. C. (N. J.), 43 Fed. Rep. 545.

26. CREDITORS' BILL—Who May Maintain.—The fact that an assignment of a note was made by the payee to enable the assignee to confess judgment thereon in his own name, and that he had no interest either in the proceeds of the note or in the judgment, will not, on the return unsatisfied of an execution issued in his name, prevent the assignee from maintaining a creditors' bill, as provided by Rev. St. Ill. ch. 22, § 49, the maker of the note not having been placed in any worse position than he would have been had the payee brought both the action on the note and the creditors', bill in his own name.—*Atkinson v. Foster*, Ill., 25 N. E. Rep. 528.

27. CRIMINAL LAW—Homicide.—On a trial of a deputy sheriff for the homicide of an intoxicated person while endeavoring to arrest him, evidence in defendant's behalf that the deceased resisted arrest by pointing a pistol at defendant, and that defendant then shot him, shows that defendant had reasonable grounds to believe himself in danger, and his testimony as to such belief should be admitted.—*Williams v. Commonwealth*, Ky., 14 S. W. Rep. 595.

28. CRIMINAL LAW—Infamous Crime.—An offense punishable by imprisonment for more than one year is an infamous crime, and cannot be prosecuted by information; Rev. St. U. S. § 5541, providing, in case of a sentence for a longer period than one year, the court may order it to be executed in any State jail or penitentiary within the district or State.—*United States v. Cobb*, U. S. D. C. (Va.), 43 Fed. Rep. 570.

29. CRIMINAL LAW—Visiting Gambling Houses.—Order No. 1587, § 33, as amended by Order No. 1955, of the board of supervisors of San Francisco, making it a misdemeanor to visit any gambling house, is valid, and not in conflict with the general law in the Penal Code declaring it to be a misdemeanor to carry on or bet at a gambling game, as the latter law does not include the offense of visiting the game.—*Ex parte Boswell*, Cal., 24 Pac. Rep. 1060.

30. DAMAGES—Evidence.—Where, in an action for personal injuries, there is some evidence that plaintiff's injuries are permanent, though the evidence on that point is conflicting, the Carlisle Life Tables are admissible in evidence in estimating the damages.—*Blair v. Madison County*, Iowa, 46 N. W. Rep. 1093.

31. DEED—Capacity—Suicide.—Suicide, preceded by several unsuccessful attempts, is not proof *per se* of incapacity to contract.—*Jones v. Gorham*, Ky., 14 S. W. Rep. 599.

32. DEED—Construction.—The mother of two brothers each of whom owned an undivided half interest in a farm and in the live-stock and farming utensils thereon, having inherited the share of one of them, made a deed of the land to the survivor, in which, after the description, were inserted the words, "and also one-half of all personal property of every name or nature attached to the above real estate:" *Held*, that she thereby conveyed not merely her interest in the fixtures attached to the land but in all the live-stock and farming implements as well.—*Hoffman's Estate v. Hoffman*, Iowa, 46 N. W. Rep. 1106.

33. DRAINAGE—Commissioners.—Under Rev. St. Ill. 1889, ch. 42, § 131, which provides that drainage commissioners shall determine a system of drainage for the district, and section 116, *Id.*, which gives them power, after the original plan has been carried out, to change it so that all lands in the district shall receive proper and equal benefits, such commissioners have power, after adopting a system of drainage, classifying the lands in the district, and making an assessment on them, to change the system before the drains are completed, and to make an additional assessment therefor, without reclassifying the lands or giving notice to the land-owners.—*Lewis v. Milk Grove Special Drainage Dist.*, Ill., 25 N. E. Rep. 516.

34. EMINET DOMAIN.—In proceedings to condemn land for railroad purposes, under the Michigan statute, the jury have only to determine the necessity of taking the property, and the damages; and, there being no statutory provision for the submission of special questions, error cannot be predicated on their not answering such questions.—*Toledo, M. & R. Co. v. Campau*, Mich., 46 N. W. Rep. 1026.

35. EQUITY—Legal Remedy.—A bill in equity will not lie to restrain defendants from taking ore from plaintiffs' lands, claiming a legal right to do so under devises and conveyances purporting to grant such rights as appurtenant to the properties conveyed, for the question of the right is a legal one to be settled in a court of law.—*Duncan v. Holidaybury & Gap Iron-Works*, Penn., 20 Atl. Rep. 647.

36. EQUITY PRACTICE—Admission of Evidence after Case Closed.—Under Code Iowa, § 2799, providing that "at any time before a cause is finally submitted to the court or jury, either party may be permitted by the court to give further testimony to correct an evident oversight or mistake," it is no abuse of discretion for the court to permit a bank, defendant in an equity suit brought to compel an accounting for notes held by it, and to recover their value, to give additional evidence offered the day after the case was closed and sub mitted, going to show that the notes were of no value. *Sickles v. Dallas County Bank*, Iowa, 46 N. W. Rep. 1089.

37. EXECUTION—Time of Issuance.—The general rule under Code Civil Proc. Cal. § 681, is that execution cannot issue after five years. Section 685, however, provides that "in all cases other than for the recovery of money the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of court, upon motion:" *Held*, that a judgment foreclosing a mortgage given to secure a note, though not a personal judgment, was a judgment for the recovery of money within the five years' limitation.—*Jacks a. Johnston*, Cal., 24 Pac. Rep. 1057.

38. FACTORS AND BROKERS—Sale.—Defendant made plaintiff his agent for the sale of certain land for cash, all the price above a certain sum to belong to plaintiff as his compensation. Plaintiff found a purchaser will-

ing to pay said sum in cash, and the excess to plaintiff on time: *Held*, that such sale complied with the terms of the agreement.—*Van Gorder v. Sherman*, Iowa, 46 N. W. Rep. 1087.

39. FEDERAL OFFENSE—Indecent Letters.—Under Rev. St. U. S. § 3893, declaring that "every obscene, lewd, or lascivious book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character, * * * are hereby declared to be non-mailable matter," and declaring that any person who knowingly mails any such matter shall be liable to punishment, the mailing of a letter of indecent character, but which is not obscene, lewd, or lascivious, is not an offense, for it is not a "publication" within the meaning of the statute.—*United States v. Clark*, U. S. D. C. (Iowa), 43 Fed. Rep. 574.

40. FORCIBLE DETAINER — Jurisdiction.—Summary proceedings under How. St. Mich. § 8295, for the possession of premises, cannot be maintained where it appears that each party claims the paramount title from a third person.—*Hill v. Olin*, Mich., 46 N. W. Rep. 1038.

41. FRAUD—Relief in Equity.—Courts have not undertaken to lay down any specific and definite rules in regard to fraud by which in all cases they will be controlled in giving relief.—*Meldrum v. Meldrum*, Colo., 24 Pac. Rep. 1083.

42. FRAUDULENT CONVEYANCES—Assignment for Benefit of Creditors.—The fact that a judgment by confession was entered on the same day that the debtor made a general assignment for the benefit of creditors does not make the judgment void as an unlawful preference, where it is not shown that the debtor contemplated making an assignment when he executed the note some time before the entry of judgment.—*Hier v. Kaufman*, Ill., 25 N. E. Rep. 517.

43. GAMING—Loan of Money.—Mere knowledge, on the part of a person loaning money, that the borrower intends to use it by engaging in the purchase of options on grains in the market of another State, or investing it in wagering or gambling contracts, will not defeat a recovery.—*Jackson v. City Nat. Bank*, Ind., 25 N. E. Rep. 430.

44. GARNISHMENT—Fund in Custodia Legis.—A fund arising from the sequestration and sale of property, placed, by order of court, in the clerk's hands to await the result of the suit, is not subject to garnishment either before or after the rendition of judgment, and it is immaterial that the suit itself has been transferred to and decided in a federal court.—*Curtis v. Ford*, Tex., 14 S. W. Rep. 614.

45. HABEAS CORPUS — Justice of the Peace.— Under Gen. St. Conn. § 695, providing that any justice of the peace may, on the complaint of any person that he fears bodily harm, require sureties of the peace of the person complained of, and section 690, providing that every justice may issue process upon any complaint authorized by law, returnable before himself or any other proper authority, a person may be lawfully bound over to keep the peace by one justice, though the complaint is made before and the warrant issued by another.—*In re Bion*, Conn., 20 Atl. Rep. 662.

46. HIGHWAYS—Appeals.—Mansf. Dig. Ark. § 5940, enacted as part of the road law of 1871, and prescribing the time and manner of appealing from orders of the county courts directing the opening of public roads, was not repealed by the subsequent enactment of section 1436, regulating appeals generally from such courts, and an appeal taken to the circuit court from such an order, in disregard of the special provisions of the road law as to appeals, was properly dismissed.—*Baugher v. Rudd*, Ark., 14 S. W. Rep. 623.

47. HOMESTEAD—Judgment.—A judgment against a husband is not a lien on land occupied as a homestead by him and his wife at the time of its rendition, and at the time the debt on which it was founded was contracted, and does not become a lien thereon by a conveyance of the land to the wife.—*Beyer v. Thoeming*, Iowa, 46 N. W. Rep. 1074.

48. HUSBAND AND WIFE.—An insolvent's wife made a contract with a railroad company for boarding its employees. The business was carried on by him exclusively, but everything was done in his wife's name. She put no money into the enterprise, and the provisions used were furnished on her credit and assurances of payment by the railroad company: *Held*, that the profits of the business were liable for the insolvent's debts.—*Hamil v. Augustine*, Iowa, 46 N. W. Rep. 1113.

49. INSURANCE—Conditions of Policy.—The use, by the assured, of a steam-engine to operate a corn-sheller, near an insured corn-crib, is within the meaning of a clause in the policy that it shall be void "if there be any change in the exposure, by the erection or occupation of adjacent buildings or by any means whatever in the control or knowledge of the assured."—*Davis v. Western Home Ins. Co.*, Iowa, 46 N. W. Rep. 1073.

50. INTOXICATING LIQUORS—Civil Damages.—In an action under Act Mich. 1887, No. 313, for damages resulting from the sale of intoxicationg liquors to one in the habit of getting intoxicated, plaintiff should be allowed to amend the complaint by alleging defendant's knowledge of the habit of the person to whom the liquor was sold of getting intoxicated, where the necessity of this allegation is raised for the first time on the trial.—*Fletcher v. Forler*, Mich., 46 N. W. Rep. 1023.

51. JUDGMENT—Execution.—The time during which a judgment remains a lien is not extended by the levy of an execution during that time, followed by a sale after the time has expired.—*Lakin v. C. H. McCormick & Bro.*, Iowa, 46 N. W. Rep. 1061.

52. JUDGMENT — Lien.—Where a conveyance is executed without consideration and without fraud pursuant to a parol agreement that the grantee shall reconvey, the grantee's creditors cannot subject the land to the lien of their judgments obtained before the reconveyance is executed during the time the grantee holds the legal title as trustee.—*Main v. Bosworth*, Wis., 46 N. W. Rep. 1043.

53. LANDLORD AND TENANT — Appeal.— Where, in a summary proceeding by the landlord to recover possession of the leased premises, defendant, after having taken an appeal from the judgment against him, surrenders the possession, such surrender does not affect the appeal, for it does not operate as a satisfaction of the judgment, nor as an admission that at the commencement of the suit defendant was holding the land unlawfully.—*Hanaw v. Bailey*, Mich., 46 N. W. Rep. 1039.

54. LIBEL AND SLANDER—Evidence.—An article published in a newspaper charged plaintiff, in sensational style, under the headings "Inhuman," and "A case of cruelty," with abusing his wife by taking away her young child, and declaring that she should never see it again; with not providing her with sufficient fuel to keep her warm; with telling her that he had fixed her friends so that they would have nothing more to do with her; and with attempting to make it appear that she was insane, so that her complaints against him should not be noticed: *Held*, that the publication, if false, was libelous *per se*, as calculated to bring plaintiff into contempt and excite hatred against him.—*Republican Pub. Co. v. Mosman*, Colo., 24 Pac. Rep. 1051.

55. LIFE INSURANCE—Beneficiary.—In Wisconsin, one who has procured a policy of insurance on his own life for the benefit of another, and has paid the premiums thereon, may dispose of the insurance, by will or otherwise, to the exclusion of the beneficiary named in the policy; and the fact that the change is made during the beneficiary's life-time does not affect the rule.—*In re Breitung's Estate*, Wis., 46 N. W. Rep. 891.

56. LIMITATION OF ACTIONS — Guardian and Ward.— Under Rev. St. Ind. 1881, § 2521, making it the duty of the guardian at the expiration of his trust to pay over to the proper person the estate of his ward remaining in his hands, the right of action of the ward accrues at his coming of age, and the statute of limitations then begins to run in favor of the guardian.— *Lambert v. Billheimer*, Ind., 25 N. E. Rep. 451.

57. LIMITATION OF ACTIONS—Personal Injuries—Physicians.—An action against a physician for damages occasioned by his malpractice in treating plaintiff under a verbal contract is barred in two years, under Code Iowa, § 2529, subd. 1, providing that "actions founded on injuries to the person or reputation, whether based on contract or tort," shall be brought within two years, and subdivision 4 of that section, providing that "those founded on unwritten contracts" shall be brought within five years, does not apply to an action for injury to the person resulting from the breach of an unwritten contract.—*Fadden v. Satterlee*, U. S. C. C. (Iowa), 43 Fed. Rep. 568.

58. LIMITATION OF ACTIONS—Statute.—Under Rev. St. Tex. art. 3216, which suspends the running of the statute of limitations during the absence from the State of a person against whom a cause of action has accrued, the absence from the State of a vendee of land suspends the running of the statute against the vendor's lien, even as to the vendee's sub-purchaser of part of the land, who has continuously resided in the State. The lien is incident to the claim for purchase money; and, if that claim is not barred, the lien is not.—*Folwell v. Henning*, Tex., 14 S. W. Rep. 613.

59. MASTER AND SERVANT—Dangerous Appliances.—A railroad employee has a right to presume that the appliances used in work which he is required to perform are reasonably safe, and it is the duty of the company, when such is not the case, to inform him of the danger and the methods of avoiding it.—*Grannis v. Chicago, St. P. & K. C. Ry. Co.*, Iowa, 46 N. W. Rep. 1067.

60. MASTER ANE SERVANT—Fellow-servant.—Where it is the daily duty of a saw-mill hand to go down under the band-saw wheel at noon while the machinery is not in motion, and clean out the sawdust, the mill owners are not liable for his death caused by the engineer starting the machinery while he was under the wheel, in the performance of this daily duty, as the engineer is his fellow-servant.—*Bergstrom v. Staples*, Mich., 46 N. W. Rep. 1035.

61. MASTER AND SERVANT — Negligence.— Where an employer negligently provides his workman with improper and unsafe apparatus with which to perform the work, and the workman, without any fault on his part, is injured, owing to the employer's neglect to provide suitable, safe and proper appliances, the employer is liable for the injury.—*Union Pac. Ry. Co. v. Broderick*, Neb., 46 N. W. Rep. 1121.

62. MECHANIC'S LIENS.—A guardian of minor children, in good faith, but without any authority from the chancellor, reconstructed an old building on the children's land, which enhanced the value of the property and enabled them to realize an income therefrom: *Held*, that material-men, whose property had been in good faith used in making the improvements, were equitably entitled to be paid the actual cost of their materials out of the enhanced rental value of the property by reason of the improvements, after deducting therefrom the insurance, taxes and costs of keeping the premises in repair.—*Bent v. Barnett*, Ky., 14 S. W. Rep. 596.

63. MECHANICS' LIENS—Priorities.—In a contract for the sale of land, it was stipulated that the purchaser should erect a dwelling upon the premises within a stated time. The building was erected, but the labor performed and material furnished were not fully paid for: *Held*, in an action to foreclose the mechanic's lien, that the liens of the mechanic and material-man have priority over the lien of the vendor for unpaid purchase money.—*Bohn Manuf'g Co. v. Kountze*, Neb., 46 N. W. Rep. 1123.

64. MECHANIC'S LIEN—Priorities.—Where a vendee of real estate, under a contract of sale containing a stipulation that the purchaser shall construct a building upon the premises, erects a building thereon, the laborer or material-man is entitled to a lien against the property paramount to the lien of the vendor.—*Millsap v. Ball*, Neb., 46 N. W. Rep. 1125.

65. MINING CLAIMS—Real Property.—A mining claim located on the public domain is real property, and the subject of complete ownership as a claim, and the locator thereof, or his successor in interest, having fully complied with the terms prescribed by congress for acquiring title thereto, is, so long as he continues such compliance, the owner of the claim for all practical purposes.—*McFeters v. Pierson*, Colo., 24 Pac. Rep. 1076.

66. MORTGAGE—Cancellation.—Where in an action to annul a mortgage the evidence is conflicting and evenly balanced as to whether the mortgage when executed contained a description of the property, plaintiff cannot recover, the presumption being that the mortgage had not been altered.—*Harding v. Des Moines Nat. Bank*, Iowa, 46 N. W. Rep. 1071.

67. MORTGAGE—Redemption.—In a suit to foreclose a trust-deed which covered a large number of lots, and which provided that any number of such lots might be redeemed in exchange for a corresponding number of the bonds secured by the trust deed, a purchaser of some of said lots filed a cross-bill to redeem, alleging that he had purchased and tendered to the trustee the requisite number of bonds. His right to redeem was denied by the trial court, but finally allowed by the supreme court, and the cause was remanded "for further proceedings, in conformity with the opinion," after 14 years of litigation: *Held*, that he could not then change his claim so as to be allowed to redeem only part of his lots.—*Sanders v. Peck*, Ill., 25 N. E. Rep. 508.

68. MUTUAL BENEFIT INSURANCE—Dues.—A membership certificate was conditioned upon the member's complying with the rules of the society. He failed to pay certain dues required by such rules, and was accordingly suspended. After his death, the beneficiary paid the dues to the collector of the local society, but the receipt thereof was not authorized by the society itself: *Held*, that the society was not liable on said certificate.—*Brown v. Grand Council*, Iowa, 46 N. W. Rep. 1086.

69. NEGOTIABLE INSTRUMENTS—Payment by Check.—Where a depositor, having sufficient funds standing to his credit, tenders his check on his bank in payment for negotiable paper which he has for sale, and the bank accepts a check, and charges it against the deposit, and delivers over the paper, the depositor is a purchaser of the paper for value, the antecedent debt of the bank to him being to that extent extinguished.—*Mayer v. Heidelbach*, N. Y., 25 N. E. Rep. 416.

70. PARTNERSHIP—Firm Assets.—Where a firm is indebted to a bank, and one of the partners is also indebted to it as an individual, an assignment of all the firm assets in payment of these debts will be valid only so far as it is a payment of firm liabilities if the other partner was ignorant of the individual debt, and did not assent to its payment out of firm assets.—*Newell v. Martin*, Iowa, 46 N. W. Rep. 1120.

71. PARTNERSHIP—Negotiable Instrument.—Where, in an action on a note executed by one partner in the name of the firm, it appears that the other subsequently recognized it as a firm obligation, and paid interest on it, it is immaterial that the partner executing signed the firm name as "Max, Meisheimer & Co.," when in fact it was "Meisheimer & Co."—*Meisheimer v. Hommel*, Colo., 24 Pac. Rep. 1079.

72. PARTNERSHIP—What Constitutes.—A contract by which a patentee gives the right to manufacture his machine to two persons, who agreed to endeavor to create a market for, and manufacture and sell, the machines, giving the patentee a portion of the profits, but containing no provision as to how the licensees are to carry out their undertaking as between themselves, is not sufficient to show a partnership.—*Morgan v. Farrel*, Conn., 20 Atl. Rep. 614.

73. PARTNERSHIP—What Constitutes.—An agreement, setting out that certain lots have been purchased for the joint benefit of two persons, constitutes a partner-

ship as to the lots, and though the conveyance is taken in the name of one only, the other is entitled to his share of the profits accruing from a resale.—*Heard v. Wilder*, Iowa, 46 N. W. Rep. 1075.

74. PRACTICE—Change of Venue.—In an action to enjoin a sale under execution, in which the sheriff, though having no personal interest, is joined as co-defendant, he is not entitled to a change of venue on his motion made after the real defendants in interest have answered, under the provision of Code Iowa, § 2589, that, "if a suit be brought in the wrong county, it may there be prosecuted to a termination, unless the defendant, before answer, demanded a change of place of trial to the proper county."—*Omaha & St. L. Ry. Co. v. O'Neill*, Iowa, 46 N. W. Rep. 1100.

75. PRINCIPAL AND AGENT—Ratification.—A woman as local agent of a manufacturing company sold notes, belonging to her principal, to a bank, supposing that she had a right to do so, and remitted the proceeds to the company. The sale was, in fact, without authority, of which circumstance the bank had constructive notice from the form of the notes: *Held*, in replevin by the company, that by retaining the proceeds of the sale after being informed of it, it ratified the transaction, though the money had been applied to a different account from that to which it would have gone if it had been known from what source it came.—*Wm. Deering & Co. v. Grundy County Nat. Bank*, Iowa, 46 N. W. Rep. 1117.

76. PRINCIPAL AND SURETY—Marshaling Assets.—A creditor who had a claim against two debtors, one a principal and the other a surety, cannot be compelled by another creditor of the principal debtor to exhaust his remedy against the surety before the proceeding against the principal.—*In re Hobson*, Iowa, 46 N. W. Rep. 1095.

77. PUBLIC LANDS—Commissoner of State.—Act. Tex. April 6, 1881, which authorizes the commissioner of the general land-office to order a re-examination of public lands if he has reason to believe that the report on file in the land-office as to the value or quality of the land is erroneous, gives him the implied power to withdraw from sale lands ordered to be re examined until such re-examination is completed.—*Kentucky Cattle-Raising Co. v. Bruce*, Tex., 14 S. W. Rep. 619.

78. QUIETING TITLE—Possession.—Act. Ark. 1857, to quiet land titles, declaring that no action for the recovery of any land against any person, his heirs or assigns, holding under a donation deed from the State shall be maintained, unless the plaintiff, his ancestor, or grantor, was seized or possessed within two years next before the commencement of the action, is available as a defense to one who holds under a donation deed good upon its face, though perhaps invalid for reasons not there appearing.—*Simms v. Canby*, Ark., 14 S. W. Rep. 623.

79. RAILROAD COMPANY—Contract.—A city ordinance gave a railroad company permission to lay its tracks along a certain street upon condition that the company should pay for the erection of a viaduct over the street and should indemnify the city "from any and all legal damages, judgments, decrees, and costs and expenses of the same which it may suffer, or which may be recovered or obtained against said city, for or by reason of the granting of such privileges and authority, or resulting from the passage of this ordinance, or any matter or thing connected therewith:" *Held*, that the company was liable for a judgment recovered against the city for damage caused to property by the construction of such viaduct.—*Chicago B. & Q. R. Co. v. City of Chicago*, Ill., 25 N. E. Rep. 514.

80. RAILROAD COMPANY—Fire.—Where a railroad company, by its agents and employees, in burning off its right of way, negligently allows the fire to escape upon the premises of the adjacent land-owner, where it consumes the property of the latter, the injury thus inflicted falls fairly within the scope of chapter 155, Laws 1885, as the result of a fire caused by the operation of said railroad.—*Missouri Pac. Ry. Co. v. H. A. Cady*, Kan., 24 Pac. Rep. 1088.

81. RAILROAD COMPANIES—Injuries to Persons on Track.—Decedent, while walking along a railroad track without license, was run into and killed at a distance of 150 yards from a crossing behind him, from which direction the train was coming. The engine was in a reversed position, and there was no head-light or cow-catcher on the tender. The bell was not rung, nor was the whistle blown at the crossing, though provided for by statute. Had such signals been given, decedent would probably have heard them and escaped injury. He was not seen by the trainmen until after the accident: *Held*, that decedent was a mere trespasser, to whom the company owed no duty, and therefore it was not liable.—*Toomey v. Southern Pac. Ry. Co.*, Cal., 24 Pac. Rep. 1074.

82. RAILROAD COMPANIES—Taxation.—The rule exempting from taxation for local purposes so much of a railroad company's property as is indispensable to the construction of the road, and fitting it for use, does not embrace the railroad repair-shops, and they are liable for township and school taxes.—*Pennsylvania & N. Y. Canal & R. Co. v. Vandyke*, Penn., 20 Atl. Rep. 653.

83. RECEIVER—Estoppel—Injunction.—The receiver of a bank who has, with the knowledge of the court that appointed him, defended in the name of the bank an attachment suit brought against it, and obtained a release of the attached property on forthcoming bond, cannot, after judgment has been rendered against the bank in the attachment suit, enjoin the attaching creditors from suing on the forthcoming bond.—*Smith United States Express Co.*, Ill., 25 N. E. Rep. 525.

84. RELEASE AND DISCHARGE—Damages.—A passenger, suing for personal injuries, had accepted money from defendant railroad company, giving a release, which he sought to avoid on the ground that he was insane or unconscious when it was given. The jury were charged that the release was valid if he used or retained the money, knowing that he had received it in satisfaction of his injuries, and did not promptly disaffirm the contract, but acquiesced therein. The only evidence of satisfaction was the fact that he had in some manner disposed of the money: *Held*, that there was no error in the instruction.—*International & G. N. R. Co. v. Brazzil*, Tex., 14 S. W. Rep. 609.

85. REPLEVIN—Evidence.—Where, in an action to recover personal property, defendant claims title under a chattel mortgage, which plaintiff attacks as invalid because the mortgagor when he bought the property did not take possesion of it, and the fact of his taking possession is an issue in the case, the mortgage is admissible in evidence.—*Lansley v. Van Alstyne*, Iowa, 46 N. W. Rep. 1119.

86. RES ADJUDICATA—Forcible Entry and Detainer.—In an action of forcible entry and detainer, it appeared that the plaintiff's title was derived through a foreclosure suit against defendant. The land was defendant's homestead, and his wife was not a party to either suit: *Held*, that defendant could not set up as a personal defense his wife's homestead interest in the land, since he might have pleaded that defense in the foreclosure suit.—*Dodd v. Scott*, Iowa, 46 N. W. Rep. 1067.

87. SALE OF LANDS—Forfeiture.—A contract for the sale of lands provided that the purchaser should pay a sum down, take immediate possession, and pay the balance on or before three years, with interest, when he was to receive a clear title. In case of default he was to forfeit both the lands and the sums paid. The vendor had no title to part of the lands sold: *Held*, that so long as he was unable to make a conveyance in accordance with the contract, there could be no forfeiture for non-payment of interest due him by the vendee.—*Getty v. Peters*, Mich., 46 N. W. Rep. 1036.

88. SCHOOLS AND SCHOOL DISTRICTS.—Where the president of a board of school directors is authorized to employ teachers with the consent of the board, and one whom he employs as a teacher, by written contract, begins teaching under the contract, with the knowledge of each member of the board, who know that the board has taken no action on the contract, the

consent of the members will be presumed, and the contract held valid.—*Hull v. Independent Dist.*, Iowa, 46 N. W. Rep. 1053.

89. SHIPPING — Boarding Arriving Vessel.— Section 4606 of the Revised Statutes, providing for the punishment of any person who, without the consent of the master, goes on board an arriving vessel before she reaches her place of destination, and is moored thereat, applies to foreign vessels.—*United States v. Sullivan*, U. S. C. C. (Oreg.), 43 Fed. Rep. 602.

90. SPECIFIC PERFORMANCE — Contracts.—A contract to convey a city lot, which stipulates that the conveyance shall be subject to the house-line and building restrictions mentioned in the contract, will be specifically enforced as made, and the vendee cannot have a conveyance decreed free from such restrictions.—*Abraham v. Stewart*, Mich., 46 N. W. Rep. 1030.

91. TAXATION—Lien.—The mortgagor of realty after foreclosure and sale, but before his right of redemption has expired, is the owner thereof within the meaning of Code Iowa, § 865, providing that "taxes due from any person upon personal property shall be a lien upon any real property owned by such person."—*New England Loan & Trust Co. v. Young*, Iowa, 46 N. W. Rep. 1103.

92. TAX-DEED—Registration.—Although the registration of a tax-deed before the expiration of the period of redemption does not make it a muniment of title, or render it available as a basis of possession, under Rev. St. Tex. art. 3193, which prescribes a limitation of five years in favor of one claiming under a deed "duly registered," yet, upon the expiration of the redemption period, such prior registration becomes good, and a new registration is not required.—*Davis v. Hurst*, Tex., 14 S. W. Rep. 610.

93. TAX-SALE— Redemption.—One who, without any claim of ownership or right of possession, herds his cattle on a range of open and uncultivated land is not in possession of a quarter section forming part of the range, within the meaning of Code Iowa, § 894, requiring notice of the expiration of the time of redemption from a tax-sale to be served on the person in possession of the land.—*Brown v. Pool*, Iowa, 46 N. W. Rep. 1069.

94. TAX-TITLES—Documentary Evidence.—It is no objection to the admissibility in evidence of a sheriff's tax-deed, regular on its face, that it is not shown that the comptroller general had properly advertised the land before issuing the *fi. fa.* for taxes, and that the deed does not show that the land was properly advertised, as it will be presumed that the recitals of the deed as to the conduct of the sheriff are correct, and that the comptroller general did his duty.—*Livingston v. Hudson*, Ga., 12 S. E. Rep. 17.

95. TRUSTEES—Compensation.—The management of a wife's one-third interest in property, conferred on her husband by a decree of divorce, is a personal trust, which he can neither transfer nor perpetuate; and the trustees under his will, which did not even assume to make any disposition of such trust, are not entitled to any fees and commissions under the will for their management of the wife's one-third interest after the husband's death.—*Blanckenburg v. Jordan*, Cal., 24 Pac. Rep. 1061.

96. TRUSTS—Revocation.—Where an improvident son conveys his property to his mother, in trust for himself, and is also by his father's will made the beneficiary of other property bequeathed to his brothers in trust for him, and subsequently executes another deed conveying all his property—both that contained in the conveyance to his mother and that bequeathed to him—to his mother and brothers, in trust for himself, but on terms more favorable to them than those contained in the first deed and the will, he may have this last conveyance set aside as a void contract between the trustee and *cestui que trust*, but the original trust will remain in force.—*Avery's Trustees v. Avery*, Ky., 14 S. W. Rep. 593.

97. TRUSTS—Vendor.—A vendee under a land contract, who had in fact obtained the contract as agent for a land company, assigned it to the company's manager, and also executed a subcontract in which he agreed to convey the land to the company. The vendee paid one installment of the purchase price, and the company's manager paid the second—both with the company's funds: *Held*, that these facts did not raise an implied trust in the land in favor of the company, as against the vendor.—*Stratton v. California Land & Timber Co.*, Cal., 24 Pac. Rep. 1065.

98. USURY—What Constitutes.—A note, drawing 10 per cent. interest, being several months past due, an agreement is usurious which extends the time of payment in consideration of a promise to pay 12 per cent., the highest legal rate, from the maturity of the note.—*Krause v. Pope*, Tex., 14 S. W. Rep. 616.

99. VENDOR AND VENDEE—Contract.—Where a contract for the sale of land provides that the vendee may disaffirm the sale at the end of a year, in which event he is to be repaid his purchase money, with 10 per cent. interest, on giving 30 days' notice of his intention to disaffirm, the vendor cannot complain that the vendee gave more than 30 days' notice of his intention, as this is to the vendor's advantage.—*Herberger v. Husmann*, Cal., 24 Pac. Rep. 1058.

100. VENDOR'S LIEN—Quitclaim Deed.—Under Code Iowa, § 1940, which provides that no vendor's lien shall be enforced after a conveyance by the vendee, unless such lien is reserved by written instrument, acknowledged and recorded, or unless such conveyance is made pending suit to foreclose the lien, a quitclaim deed by the vendee is sufficient to bar a vendor's lien not evidenced by writing.—*Chrisman v. Hay*, U. S. C. C. (Iowa), 43 Fed. Rep. 552.

101. WATERS AND WATER-COURSES—Rights of Fishermen.—The owner of a tug which on a clear, calm day negligently runs through a fisherman's net that was easily preceptible and could have been avoided, without prejudice to the prosecution of the voyage, is liable for the damage.—*Wright v. Mulvaney*, Wis., 46 N. W. Rep. 1045.

102. WILLS—Construction.—A testator after devising property to his two sons absolutely and other property in trust for the two children of his deceased daughter, declared in the fourteenth paragraph of his will that, "should either of my sons die leaving no legal descendants, then and in that event, all the property that should have been his if living, shall go to and become the property of the survivor and his legal descedents, and the property of the survivors of the trustees mentioned, for the uses and trusts of the wards," etc.: *Held*, that it was not the intention to create a limitation over upon an indefinite failure of issue, but only upon the death of the son without issue living at the time of his death, and hence there was no attempt to create a perpetuity, and the limitation was good.—*Armstrong v. Douglass*, Tenn., 14 S. W. Rep. 604.

103. WILL—Estate.—A devise of property in trust to pay the income to testator's daughter, "for her sole and separate use, upon her separate receipt, without the control or interference of any husband she may have or take for and during all the the term of her natural life," creates a trust for life and not for coverture, though the daughter, being only five years old, is not married or contemplating marriage.—*In re Dorney's Estate*, Penn., 20 Atl. Rep. 645.

104. WITNESS—Credibility.—When a witness denies his former conviction, it may be shown by the record under How. St. Mich. § 7543, providing that no person shall be disqualified as a witness by reason of crime, but conviction of crime may be shown to affect his credibility.—*Helwig v. Laschowski*, Mich., 46 N. W. Rep. 1033.

105. WITNESS—Memoranda.—A witness may refresh his memory by reference to *memoranda* of the dates, weights, and prices entered by himself at the times certain sales were made.—*Rohrig v. Pearson*, Colo. 24 Pac. Rep. 1063.